Canada Industrial Relations Board | Conseil canadien des relations industrielles

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Reasons for Decision

Syndicat des employé-es de TQS Inc. (FNC-CSN); Syndicat des employé-e-s de l'ingénierie de TQS Inc. (FNC-CSN); Syndicat des employé(e)s de bureau de TQS Inc. (FNC-CSN); Syndicat des réalisatrices et réalisateurs en auto-publicité de TQS Inc. (FNC-CSN); Syndicat des employé-es de TQS-Estrie - FNC-CSN; Syndicat des réalisateurs de TQS Mauricie (FNC-CSN); Syndicat de TQS Mauricie (FNC-CSN); Syndicat des employé(e)s de Cogéco télévision Jonquière CKTV-TQS (FNC-CSN); Syndicat des employé(e)s de CFAP-TV (TQS-Québec), Local 3946 of the Canadian Union of Public Employees,

applicants,

and

TQS Inc.; TQS Inc. (CKSH-TV and CKFS-TV); TQS Inc. Mauricie; Cogeco Radio-Télévision Inc.; Remstar Corporation; Remstar Broadcasting Inc.,

respondents,

and

Point Bleu Productions Inc.; Projet momentum TV Inc.; Ms. Julie Dalbec (carrying on business as Productions Julie Dalbec); Les Productions 4C3 HD; Agence de nouvelles ADN5 Inc.; 9198-1688 Québec Inc. (carrying on business as Zed Productions),

interested parties.

Board File: 27181-C
Neutral Citation: 2012 CIRB **668**
December 10, 2012

Canada

(For ease of reference, see Table of Contents at the end of this decision)

The Board was composed of Ms. Louise Fecteau, Vice-Chairperson, sitting alone pursuant to section 14(3) of the *Canada Labour Code (Part I–Industrial Relations)* (the *Code*).

Counsel of Record

Mr. Benoit Laurin and Mr. Daniel Charest, for the Syndicat des employé(e)s de Cogéco télévision Jonquière CKTV-TQS (FNC-CSN), the Syndicat des employé-es de TQS-Estrie - FNC-CSN, the Syndicat des employé(e)s de bureau de TQS Inc. (FNC-CSN), the Syndicat des employé-es de TQS Inc. (FNC-CSN), the Syndicat des employé-e-s de l'ingénierie de TQS Inc. (FNC-CSN), the Syndicat des réalisatrices et réalisateurs en auto-publicité de TQS Inc. (FNC-CSN), the Syndicat des réalisateurs de TQS Mauricie (FNC-CSN) and the Syndicat de TQS Mauricie (FNC-CSN);

Ms. Annick Desjardins, for the Syndicat des employé(e)s de CFAP-TV (TQS-Québec), Local 3946 of the Canadian Union of Public Employees;

Ms. Catherine Maheu and Ms. Josiane L'Heureux, for TQS Inc. (CKSH-TV and CKFS-TV), TQS Inc., TQS Inc. Mauricie, Cogeco Radio-Télévision Inc., Remstar Corporation and Remstar Broadcasting Inc;

Mr. Guy Dussault and Mr. Nicolas Leclerc, for Point Bleu Productions Inc., Projet momentum TV Inc., Ms. Julie Dalbec (carrying on business as Productions Julie Dalbec), Les Productions 4C3 HD, the Agence de nouvelles ADN5 Inc. and 9198-1688 Québec Inc. (carrying on business as Zed Productions).

I–Nature of Complaint

[1] This matter involves a complaint of unfair labour practice filed on December 1, 2008, pursuant to section 97(1) of the *Code*. The Syndicat des employé-es de TQS Inc. (FNC-CSN), the Syndicat des employé-e-s de l'ingénierie de TQS Inc. (FNC-CSN), the Syndicat des employé(e)s de bureau

de TQS Inc. (FNC-CSN), the Syndicat des réalisatrices et réalisateurs en auto-publicité de TQS Inc. (FNC-CSN), the Syndicat des employé-es de TQS-Estrie - FNC-CSN, the Syndicat des réalisateurs de TQS Mauricie (FNC-CSN), the Syndicat de TQS Mauricie (FNC-CSN) and the Syndicat des employé(e)s de Cogéco télévision Jonquière CKTV-TQS (FNC-CSN) (hereinafter referred to as the CSN-affiliated unions or the CSN unions) allege that TQS Inc., TQS Inc. (CKSH-TV and CKFS-TV), TQS Inc. Mauricie and Cogeco Radio-Télévision Inc. (hereinafter referred to as TQS or the employer) and Remstar Broadcasting Inc. and Remstar Corporation (hereinafter referred to as Remstar) violated sections 94(1) and 94(3) of the *Code*.

[2] In summary, the CSN-affiliated unions allege that the employer laid off virtually all of its unionized staff in 2008 after announcing that it was discontinuing its commercial and news production operations while concurrently making use of third-party production houses, with a view to decimating the bargaining units. They also submit that the employer bargained in bad faith, encroached on the unions' freedom of association and undermined their representative character in seeking concessions to help it deal with the company's financial difficulties. They allege that the employer attempted to interfere with the union's activities, in particular by attempting to enter into specific agreements with a number of employees in the regions to have them waive contracting-out clauses and the unions' right to file grievances respecting contracting out in return for certain benefits. They also submit that the employer attempted to enter into direct contact with the members of the bargaining units, thereby undermining the unions' representative character. They further allege that the employer consolidated positions from separate bargaining units without the consent of the unions concerned and entered into negotiations directly with employees without the consent of the unions.

[3] The Syndicat des employé(e)s de CFAP-TV (TQS-Québec), Local 3946 of the Canadian Union of Public Employees (CUPE), is a co-applicant in this matter.

[4] The complaint of unfair labour practice was originally filed along with an application for a declaration of unlawful lockout pursuant to section 92 of the *Code*, a complaint respecting the use of replacement workers pursuant to section 94(2.1) of the *Code* and a complaint of bad faith bargaining pursuant to section 50(*a*) of the *Code*. The unions subsequently withdrew the other

complaints and the application. The complaint of unfair labour practice was also accompanied by an application for a review of the bargaining unit structure, which led to the opening of a parallel file on October 16, 2009 (file no. 27793-C).

[5] On January 6, 2009, Point Bleu Productions Inc., Projet momentum TV Inc., Ms. Julie Dalbec (carrying on business as Productions Julie Dalbec), Les Productions 4C3 HD and the Agence de nouvelles ADN5 Inc. (ADN5) were granted interested party status in the instant matter. On January 7, 2009, 9198-1688 Québec Inc. (carrying on business as Zed Productions) was also granted interested party status.

[6] Hearings were held in Montréal on January 6, 7, 8, 9 and 23, 2009, February 17 and 20, 2009, March 11, 12, 13, 24 and 25, 2009, April 14, 16, 17, 20, 21, 27, 28 and 29, 2009, September 17, 2009, October 8, 9, 14 and 29, 2009, November 3, 4, 5, 12, 17 and 18, 2009, December 1, 8, 9, 10, 15 and 16, 2009, January 12, 13 and 14, 2010, October 12, 2010, November 1 and 2, 2010, and January 19, 2011. Oral arguments were heard on January 31, 2011, February 1, 2 and 18, 2011, and March 3, 4 and 29, 2011. Transcripts were prepared for those hearing days and copies were given to all of the parties as well as to the Board.

[7] The Board heard extensive oral evidence during the hearings. The CSN-affiliated unions called the following witnesses: Mr. Patrick St-Pierre, Commercial Producer, TQS Saguenay; Mr. Jean-Marie Munger, Producer, TQS Saguenay; Ms. Sylvie Dufour, Receptionist–Telephone Operator, TQS Saguenay; Mr. Sylvain Côté, Union Advisor, FNC-CSN; Mr. Michel Cloutier, Vice-President in charge of Regional Stations, TQS; Mr. Denis Gervais, Projet momentum TV Inc.; Mr. Jean Devoy, Producer, TQS Estrie; Mr. Jean Thibault, Commercial Production Director, TQS Estrie; Mr. Pierre Lauzer, Point Bleu Productions Inc. (formerly a producer with TQS Inc. Mauricie); Mr. Richard Desmarais, Administrator of ADN5; Mr. Sylvain Girard, Administrator of ADN5; Mr. Serge St-Arnaud, Producer, TQS Inc. Mauricie; Ms. Cynthia Ouellet, Computer Graphics Artist, TQS Engineering (Montréal); Mr. Patrick Handfield, Post-Production Editor, TQS Engineering (Montréal); and Mr. Tony Porrello, Executive Vice-President, TQS.

[8] CUPE called Mr. Éric Lévesque, President of the Syndicat des employé(e)s de CFAP-TV (TQS-Québec), and Mr. Renaud Francoeur, of Speed Média (formerly the general manager of CFAP-TV (TQS-Québec)).

[9] The employer called Mr. Serge Bellerose, former acting President of TQS (April to September 2008); Mr. Benoit Fontaine, a chartered accountant specializing in business turnaround with Pricewaterhouse Coopers; Mr. Christian Bernier, Internal Comptroller for TQS; Ms. Hélène Bélanger, Human Resources Manager with TQS; and Mr. Maxime Rémillard, Co-President and CEO of TQS.

[10] Several of the witnesses no longer held the positions indicated above at the time of their testimony.

II–Administrative Details

[11] On September 29, 2009, the Board was informed that TQS Inc. had changed its name to V INTERACTIONS Inc. Since the submissions made by the parties in the instant matter refer to TQS, the Board will use that name in this decision.

[12] For practical reasons and solely to make this decision more reader-friendly, the Board uses the terms "employer," "TQS" and "Remstar" indiscriminately to designate the employer, without necessarily distinguishing between TQS and Remstar Corporation. This does not in any way vitiate the Board's findings in *TQS Inc.*, 2009 CIRB 470, respecting the determination of a temporary sale of business between TQS and Remstar Corporation within the meaning of section 44 of the *Code*.

[13] The complaint in the instant matter was filed on December 1, 2008, although it relates to events going back in part to April 2008. The applicant unions explained to the Board that the complaint could not have been filed with the Board prior to September 5, 2008, despite the 90-day time limit provided for under section 97(2) of the *Code*. Indeed, on December 18, 2007, the Superior Court of Quebec (Commercial Division, Bankruptcy and Insolvency) had issued an order granting TQS protection under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 (the CCAA),

as well as a stay of proceedings. That order had specifically provided that the duration of rights, obligations, prescriptions, etc., relating to TQS would be deemed to be extended by the same length of time as the length of the stay of proceedings provided for in the order. Following an extension of the protection period established by that order, the protection granted finally came to an end on September 4, 2008. Given the circumstances, the complaint was filed within the 90-day time limit provided for by the *Code*.

[14] The matter before the Board was placed in abeyance for several months to allow the parties to try to arrive at an agreement. No agreement was reached despite several attempts. The Board heard the parties' oral arguments and then began its final deliberations on the matter, on May 18, 2011.

III–Parallel Matters

[15] The applicant unions filed an application with the Board for an interim order in connection with the instant matter pursuant to section 19.1 of the *Code*. The Board issued a decision on December 23, 2008, in *TQS Inc.*, 2008 CIRB 434, allowing the application in part. It made the following findings in regard to TQS:

> **WHEREAS** the Canada Industrial Relations Board received from the unions affiliated with the CSN, on December 1, 2008, an application alleging that the employers/respondents violated sections 94(1)(*a*), 94(2.1), 94(3)(*a*), 94(3)(*b*), 94(3)(*e*) and 50(*a*) of the *Canada Labour Code (Part I–Labour Relations)*, an application for a declaration of unlawful lockout pursuant to section 92 of the *Canada Labour Code* and an application seeking a review of the bargaining unit structure pursuant to section 18.1(1) of the *Canada Labour Code*;
>
> **AND WHEREAS**, in the main application, the unions affiliated with the CSN asked the Board to issue an interim order pursuant to section 19.1 of the *Canada Labour Code* with respect to all of the allegations in the main application;
>
> **AND WHEREAS** the Board met with the parties at a pre-hearing conference on December 3, 2008, at which time it was agreed that the application for an interim order pursuant to section 19.1 of the *Canada Labour Code* would be amended;
>
> **AND WHEREAS** the modified application for an interim order pursuant to section 19.1 of the *Canada Labour Code* requests that the Board order TQS, Remstar Corporation, Remstar Broadcasting Inc., its directors, officers, shareholders, representatives, agents, employees and any person acting on their behalf, and until such time as the Board disposes of the original application,
>
> 1- to cease and desist from attempting to enter into specific agreements in any form whatsoever with employees, whether laid off or not, so that they would waive contracting-out clauses and the unions' right to file a grievance as a condition for receiving a lump-sum severance benefit;

2- to cease and desist from attempting to enter into specific agreements in any form whatsoever with employees, whether laid off or not, so that they would waive contracting-out clauses and the unions' right to file a grievance as a condition for receiving a lump-sum severance benefit, or any other agreement, without the consent of the bargaining agents;

3- to cease and desist from intimidating and threatening employees included in the bargaining units represented by the bargaining agents;

4- with respect to any issue concerning the application of the collective agreement and negotiation of any specific agreement, transaction or discharge, including any negotiation of severance benefits or other benefits, advantages, etc., whether provided in the collective agreements or not, and with respect to any issue related to labour relations or working conditions of employees included in the bargaining units represented by the unions affiliated with the CSN and by CUPE, all information, communication or proposals, etc., must be sent exclusively to the union advisor Sylvain Côté (for the unions affiliated with the CSN) or to Yannick Desjardins (for CUPE);

5- not to dismiss, lay off or otherwise terminate the employment relationship of anyone working for TQS, Remstar Corporation or Remstar Broadcasting Inc. without the written consent of the union and the union advisor Sylvain Côté (for the unions affiliated with the CSN) or Yannick Desjardins (for CUPE);

6 - not to communicate in any way with the employees who made an affidavit in this case or in Board file no. 26864-C, or with any person who is participating or will be participating in any proceedings related to these cases, whether or not in regard to disclosures that have been made or are about to be made by an employee who is required to do so in these proceedings.

AND WHEREAS the parties had the opportunity to present their arguments on the modified application for an interim order by means of written submissions that were provided between December 3 and 19, 2008;

AND WHEREAS there is an application before the Board for a declaration of sale of business pursuant to section 44 of the *Canada Labour Code* involving the employers Remstar Corporation and Remstar Broadcasting Inc. in file no. 26864-C, and it is necessary to dispose of this application in order to determine the identity of the true employer in these proceedings and, therefore, an interim order can only be issued against TQS at this time;

AND WHEREAS, following consideration of the submissions of the parties on file, the Board decided to grant the application in part and hereby issues this interim remedial order;

THEREFORE, the Canada Industrial Relations Board hereby orders TQS, pursuant to section 19.1 of the *Canada Labour Code*,

1. to cease and desist from attempting to enter into or entering into specific agreements with employees, whether laid off or not, so that they would waive the contracting-out clauses in the collective agreements and the unions' right to file a grievance as a condition for receiving financial benefits in any form whatsoever, without the unions' consent;

2. to respect the representative character of each of the co-applicant unions and to obtain the prior written consent of the unions concerned regarding the negotiation and adjustment of new working conditions for employees who are members of the bargaining units, if such conditions are not already set out in the applicable collective agreements;

3. to respect the representative character of each of the co-applicant unions and to obtain the prior written consent of the unions concerned before implementing any measure for merging positions included in various bargaining units;

> 4. for the application of the two preceding remedies (2 and 3), given that there is no union representative in some of the bargaining units, to communicate with the designated representative of the unions affiliated with the CSN, Sylvain Côté, or with the representative of CUPE, Yannick Desjardins, as the case may be;
>
> 5. to distribute a copy of this interim order on or before December 29, 2008, either electronically or by conventional means, to all employees included in the bargaining units represented by the co-applicant unions.
>
> (*TQS Inc. (CKSH-TV and CKFS-TV)*, 2008 NBU 558)

[16] On December 25, 2008, the CSN-affiliated unions asked the Board to file a copy of the order in Quebec Superior Court, pursuant to section 23.1 of the *Code* (file no. 27236-C). On March 20, 2009, the Board ruled that there was no indication of failure or likelihood of failure to comply with its interim order of December 23, 2008, and it accordingly dismissed the application of the CSN-affiliated unions (*TQS Inc.*, 2009 CIRB 444).

[17] On September 14, 2009, in a parallel matter (file no. 26864-C), the Board determined that, between March 21, 2008, and August 29, 2008, that is, the term of a management contract between the two undertakings, there had been a temporary transfer and, thus, a sale of business within the meaning of section 44 of the *Code*, from TQS to Remstar Corporation (*TQS Inc.*, 2009 CIRB 470). That decision was upheld by a majority of a reconsideration panel, with dissent (*Remstar Corporation*, 2010 CIRB 530). The application for judicial review of the reconsideration panel's decision was dismissed by the Federal Court of Appeal on May 30, 2011 (*Remstar Corporation* v. *Syndicat des employé-es de TQS Inc. (FNC-CSN)*, 2011 FCA 183). On February 2, 2012, the Supreme Court denied an application for leave to appeal that decision (*Remstar Corporation* v. *Syndicat des employés-es de TQS Inc. (FNC-CSN) et al.*, no. 34405, February 2, 2012 (S.C.C.)).

[18] On October 16, 2009, the CSN-affiliated unions also filed an application with the Board for a review of the bargaining unit structure pursuant to section 18.1(1) of the *Code* (file no. 27793-C). On March 26, 2010, the Board allowed the application in part, in *V INTERACTIONS Inc.*, 2010 CIRB LD 2322 (reasons for decision set out in *V INTERACTIONS Inc.*, 2010 CIRB 542). In that decision, the Board found that the bargaining units of the CSN-affiliated unions should be consolidated into a single bargaining unit, but that the CUPE bargaining unit should continue to exist separately.

[19] On March 17, 2009, an application was also filed with the Board pursuant to section 18 of the *Code* to obtain recognition that the new media operations of V INTERACTIONS Inc. were covered by the intended scope of orders no. 8411-U, 8423-U, 8470-U and 9377-U (file no. 27390-C).

[20] As a result of an agreement entered into on November 3, 2011, between V INTERACTIONS Inc. and the Syndicat des employé-es de TQS Inc. (FNC-CSN) on the description of the newly merged bargaining unit and the employees covered by the said bargaining unit, the Board issued certification order no. 9843-U, thereby settling above-mentioned files no. 27793-C and 27390-C.

IV–Procedural Issues

[21] After the complaint was filed and while the hearings were underway in the instant matter, the Board had to deal with a large number of procedural issues, primarily involving the following decisions:

- confidentiality order issued on December 10, 2008, with regard to Exhibit 55.1 (document in electronic format)—order lifted through an interlocutory decision issued on March 13, 2009;

- confidentiality order issued on January 14, 2009, with regard to Exhibit 7, tab 4 (*Analyse financière préparée par M. Benoît Fontaine de Pricewaterhouse Coopers*);

- *TQS Inc.*, 2009 CIRB LD 2083; interlocutory decision of March 13, 2009, regarding counsel for the CSN-affiliated unions being allowed to ask witness Michel Cloutier leading questions—confidentiality order of December 10, 2008, lifted;

- *TQS Inc.*, 2009 CIRB LD 2103; decision of April 6, 2009, respecting exclusion of witnesses;

- amended confidentiality order dated April 22, 2009, with regard to exhibits P-42 (Projet momentum TV Inc., *Rapport de transactions par compte du 01/06/08 au 05/01/09)*; P-43 (*Fiches de production*, in bundle); P-44 (Projet momentum TV Inc., *Bilan au 19/04/09*); and P-46 (*Factures de Projet momentum TV inc. à ADN5*, in bundle);

- *TQS Inc.*, 2009 CIRB LD 2120; decision of April 29, 2009, in regard to allowing leading questions;

- *TQS Inc.*, 2009 CIRB LD 2230; decision of November 4, 2009, in regard to an objection respecting the admissibility into evidence of recordings;

- confidentiality order of November 17, 2009, in regard to exhibits P-87 (*Contrat de pré-achat de droits de diffusion concernant l'émission intitulée « Émission matinale 08-09 » entre TQS inc. et 9200-8523 Québec inc.*, dated January 12, 2009) and P-89 (minutes of meeting of April 22, 2008);

- confidentiality order of February 1, 2011, in regard to Exhibit P-137 (*Engagements de M. Tony Porrello*).

V–Background and Facts

[22] TQS is a communications company engaged in broadcasting. It operates a general interest television network. Its head office and main television station are in Montréal and it also has regional stations in Estrie (Sherbrooke), Mauricie (Trois-Rivières), and Saguenay (formerly Jonquière), as well as in Québec.

[23] The information entered into evidence indicates that, prior to the lay-off announcement of April 2008, there were 192 unionized permanent employees in Montréal, 46 in Québec, 32 in Estrie,

21 in Mauricie, and 22 in Saguenay (Jonquière), for a total of 313 unionized permanent employees out of a total of 479 permanent employees (including management and other non-unionized staff).

A–Union Structure

[24] The bargaining agents for the bargaining units at TQS are CSN-affiliated unions and CUPE. At the time the complaint was filed (prior to the consolidation of the bargaining units represented by the CSN-affiliated unions pursuant to the decision of the Board issued on March 26, 2010, in *V INTERACTIONS Inc.*, 2010 CIRB LD 2322), the CSN-affiliated unions were the certified bargaining agents for the units described below.

[25] The Syndicat des employé-es de TQS Inc. (FNC-CSN) represented the following unit:

> all employees of TQS Inc. at its Montréal establishment CFJP-TV, working as readers, writers, journalists, camera reporters, news room, correspondents, researchers, captioners, assistant producers, producers, producers-coordinators, in the news room as well as those working on program information: current and public affairs, youth and sports.
>
> (Board order no. 9377-U dated November 27, 2007)

[26] The Syndicat des employé-e-s de l'ingénierie de TQS Inc. (FNC-CSN) represented the following unit:

> all employees working in the engineering department of TQS Inc., at its establishment located in Montréal, CFJP-TV, **excluding** senior management, administrative personnel, coordinators, makeup artist and hair stylist.
>
> (Board order no. 8411-U dated February 12, 2003)

[27] The Syndicat des employé(e)s de bureau de TQS Inc. (FNC-CSN) represented the following unit:

> all employees of TQS Inc., working at its CFJP-TV station in Montréal, **excluding** production employees, those covered by the agreement with the Union des Artistes or included in other bargaining units as well as persons classified as: assistant producer, producer, producer coordinator, executive

producer, sales representatives, sales coordinator, promotional and commercial development officer, production coordinator, communication officer, editor-designer, legal counsel, assistant service manager, scheduling officer, buyer and information manager, credit manager, chief, pay and systems development and analysis, controller, assistant controller, administrative assistant, financial analyst, legal secretary, secretary to general managers, secretary - human resources, office managers, assistant managers, technical directors, analyst - inventory and rates management, director and those above the rank of director.

(Board order no. 8470-U dated April 28, 2003)

[28] The Syndicat des réalisatrices et réalisateurs en auto-publicité de TQS Inc. (FNC-CSN) represented the following unit:

all on-air promotion producers employed by TQS Inc., working at its establishment in Montréal, CFJP-TV.

(Board order no. 8423-U dated February 12, 2003)

[29] The Syndicat des employé-es de TQS-Estrie - FNC-CSN represented the following unit:

all employees of TQS Inc. (CKSH-TV and CFKS-TV), **excluding** managers (general, operations, program and production, information, technical, traffic and inventory, marketing and promotion, sales), assistant traffic manager, general manager assistant, promotion and sales assistant, and advertising consultants at its Sherbrooke location.

(Board order 8364-U dated October 23, 2002)

[30] The Syndicat des réalisateurs de TQS Mauricie (FNC-CSN) represented the following unit:

all producers of TQS Inc. (Mauricie).

(Board order 8512-U dated July 24, 2003)

[31] The Syndicat de TQS Mauricie (FNC-CSN) represented the following unit:

all employees of TQS Inc. (Mauricie), **excluding** director general, the assistant to the director general, sales director, assistants to the sales director, advertising consultants, news director, director programming, production director, accountant-comptroller, technical director-operations, producers, and free-lancers.

(Board order no. 8510-U dated July 24, 2003)

[32] The Syndicat des employé(e)s de Cogéco télévision Jonquière CKTV-TQS (FNC-CSN) represented the following unit:

> all employees of Cogeco Radio-Télévision Inc., Jonquière (Québec), **excluding** the director general and his secretary, the administrative director, the national sales and public relations director, the local sales director, the technical director, the director of operations and production, the program and news director, the commercial representatives, the temporary/casual employees, the contractual (freelance), and the correspondents.
>
> (Board order no. 7738-U dated February 3, 2000)

[33] The Syndicat des employé(e)s de Cogéco télévision Jonquière CKTV-TQS (FNC-CSN) also represented the following unit:

> all temporary and casual employees working for Cogeco Radio-Télévision Inc. in its establishment located at 2302 Sir-Wilfrid-Laurier Street, Jonquière, Quebec.
>
> (Board order no. 9149-U dated August 1, 2006)

[34] During this same period, CUPE was certified by the Canada Labour Relations Board to represent a bargaining unit comprising:

> all employees of CFAP-TV (V INTERACTIONS Inc. - Québec), **excluding** sales employees (salespersons), producers, commercial production employees (casuals) and managerial personnel, as well as persons occupying the following positions:
>
> vice-president and director general
> secretaries to the vice-president and director general
>
> **Production and information services**
> director
> secretary to the director
> chief editor
> producers
> operations manager
> administrative assistants to the production director
> stage producer
> production coordinator
>
> **Engineer services**
> director

operations coordinator and secretary

Administrative services
director
traffic manager

Marketing/sales services
director
secretary to the director
assistant to the director
publicity advisors (salespersons)
liaison, sales and commercial production officers
research and sales assistant
marketing officer.

(Board order no. 7040-U dated September 26, 1996)

[35] All of the certification orders indicated above were entered into evidence. The collective agreements entered into evidence for each of those units were in effect at the time the complaint in the instant matter was filed, except for the collective agreement signed by the Syndicat de TQS Mauricie (FNC-CSN) and the one signed by the Syndicat des réalisateurs de TQS Mauricie (FNC-CSN), which had both expired on August 31, 2008. Notice to bargain had been given in both cases.

B–TQS's Financial Difficulties and Remstar's Role

[36] In *TQS Inc. (470)*, *supra*, the Board provided a detailed explanation of TQS's financial difficulties and the different steps taken following the order issued by the Quebec Superior Court pursuant to the CCAA on December 18, 2007. It then reproduced some excerpts from the Court order and explained the particulars of the purchase offer made by Remstar and a management contract entered into on March 14, 2008, the approval of said management contract by the Canadian Radio-television and Telecommunications Commission (CRTC), lay-offs effected by the manager, Remstar, and the CRTC's approval of the change in effective control of TQS. Since all of those facts are relevant for the determination of the instant matter, some excerpts from that decision by the Board are reproduced below:

C–TQS's Financial Difficulties

[28] On December 17, 2007, financial difficulties forced Groupe TQS to apply to the Quebec Superior Court for protection under the CCAA, which was granted on December 18, 2007. In the initial order, the Superior Court appointed RSM Richter Inc. (RSM) Monitor. This appointed Monitor was to supervise Groupe TQS's business and financial affairs, as an officer of the court.

[29] This initial Superior Court order was later extended. The protection conferred by the Court expired on September 4, 2008. The order included the following provisions:

"**Restructuring**

[22] DECLARES that, to facilitate the orderly restructuring of their business and financial affairs (**Restructuring**), the Petitioners will have the right, subject to the approval of the Monitor or further order by the Court, to:

...

(d) terminate employees or lay off employees temporarily or permanently in such numbers as they deem appropriate and, to the extent that any amounts in lieu of notice, termination or severance amounts or other amounts in respect thereof are not paid in the normal course of business, make provision in this regard in the Plan, as the Petitioners may determine;

...

[23] DECLARES that, to facilitate restructuring, the Petitioners may, but will not be obliged to,

...

(b) subject to the approval of the Monitor and the CIBC, pay all salary and wages, commissions, vacation pay, pension plan contributions and other benefits due and/or any future salary and wages, commissions, vacation pay, pension plan contributions and other benefits, reimburse expenditures (including amounts charged to credit cards by employees) and any other amounts owing to current, former or future employees, consultants, officers or directors and to persons who are delivering or have delivered contract services to the Petitioners;

...

Powers of the Monitor

[29] ORDERS that RSM Richter Inc. hereby be appointed to monitor the business and financial affairs of the Petitioners as an officer of this Court (the Monitor) and that, in addition to the duties and functions referred to in section 11.7 of the CCAA, the Monitor :

...

(c) with the assistance of the Petitioners, explore the possibility of identifying one or more potential investors or one or more potential buyers for the Property;

...

[32] DECLARES that the Monitor is not, nor deemed to be, an employer or a successor employer of the employees of the Petitioners or a related employer in respect of the Petitioners within the meaning of any federal statute. ...

(translation)"

D–Remstar's Offer to Purchase

[30] On January 30, 2008, the Superior Court issued an order approving a formal process to allow any party interested in acquiring Groupe TQS to submit a firm offer.

[31] On March 3, 2008, Remstar presented an offer to purchase to RSM.

[32] On March 5, 2008, TQS's shareholders and Board of Directors accepted Remstar's offer. On March 10, 2008, the Superior Court approved the offer accepted by TQS's Board of Directors and shareholders, in the following terms:

"[4] Approves the offer accepted by the debtor's Board of Directors and shareholders on March 5, 2008.

(translation)"

[33] On March 14, 2008, Remstar entered into a management contract with 3947424 Canada Inc. and all of the entities comprising Groupe TQS.

...

E–Approval of the March 14, 2008, Management Contract by the Canadian Radio-television and Telecommunications Commission (CRTC)

[35] Under the *Broadcasting Act*, 1991, c. 11, any change in control of a broadcaster that is a CRTC licensee must be approved by the CRTC. Thus, Remstar's offer to purchase 3947424 Canada Inc. shares for the purpose of taking over TQS as sole shareholder could not be closed prior to the CRTC's approval.

[36] **On March 20, 2008**, the CRTC approved the management contract submitted by Remstar. The CRTC's letter to the Director General of Legal Affairs for TQS, signed by the Secretary General of the CRTC, reads as follows:

...

F–The Remstar Manager

[37] On April 10, 2008, Mr. Tony Porrello, in the capacity of Manager, met with the unions and issued a memorandum to all TQS staff members to inform them that TQS was working on a recovery or restructuring plan that would include staff cutbacks and measures he termed essential to the survival of the company.

[38] On April 22, 2008, Mr. Porrello issued a memorandum advising all staff members that, following the resignation of Mr. R.G. as Chairman and CEO of TQS, the Vice-Chairman, New Media and Corporate Affairs, had been named acting Chairman. In that memorandum, Mr. Porrello identified himself as the court-appointed Manager.

[39] On or around April 22, 2008, hundreds of lay-off letters were sent to TQS employees, serving as the advance notices of termination for the employees in the different bargaining units. The letters were signed by Mr. Porrello, as Manager.

[40] Starting on April 24, 2008, meetings were held between union and management representatives to arrive at an agreement on cost-cutting measures to allow the company to recover. Mr. Porrello attended the April 24, 2008, meeting in his capacity of Manager.

[41] Intensive bargaining took place between April 28, 2008, and May 2, 2008, but no agreement was reached as a result of that bargaining.

G–The CRTC and Approval of Change in Effective Control of TQS

[42] On **June 26, 2008**, the CRTC approved the change in effective control of TQS through the transfer of all issued and outstanding shares of 3947424 Canada Inc. to Remstar Broadcasting Inc., a holding company owned and controlled by Messrs. Julien and Maxime Rémillard. On August 27, 2008, it approved the transfer of the said shares. Moreover, in its decision of June 26, 2008, the CRTC renewed the broadcasting licences for TQS's television stations to August 31, 2015, and approved Remstar's proposal for changes to the programming conditions stipulated by the CRTC up to that time. The CRTC's majority decision reads in part as follows:

"In this decision, the Commission **approves** the application to change the effective control of TQS Inc. (TQS), licensee of the television programming undertakings CFJP-TV Montréal, CFJP-DT Montréal, CFAP-TV Québec, CFKM-TV Trois-Rivières, CFKS-TV Sherbrooke and CFRS-TV Saguenay, and of the TQS network, through the transfer of all of the issued and outstanding shares of 3947424 Canada Inc., the parent corporation of TQS, currently held by Cogeco Radio-Télévision Inc. (60%) and CTV Television Inc. (40%), to Remstar Diffusion inc., a corporation owned and controlled by Julien and Maxime Rémillard.

The Commission further **renews** the broadcasting licences for the above-mentioned stations from 1 September 2008 to 31 August 2015. The licences will be subject to the conditions set out in the appendices to this decision.

(*TQS inc.*, CRTC 2008-129; emphasis added)"

[37] Also of note is that a plan of arrangement with creditors was filed with the comptroller on May 7, 2008. It was accepted by TQS's creditors on May 22, 2008, and approved by the Quebec Superior Court on June 4, 2008.

C–TQS's Decision to Discontinue News, In-House Program Production and Commercial Production and Resulting Lay-Offs

[38] Around mid-April 2008, TQS decided to discontinue news and commercial production as well as in-house program production. This led to an announcement of major lay-offs and the imminent shutdown of its newsroom. On April 23, 2008, the employer announced the lay-off of 270 out of a

total of 479 permanent employees (224 out of a total of 313 unionized permanent employees were to be laid off). The lay-offs were to be effected in two stages, with the first stage on June 1, 2008, and the second, on August 31, 2008. A large number of unionized casual employees also lost their jobs as a result of the measures announced.

D–CRTC's Decision Concerning the Renewal of TQS's Licences

[39] In its decision of June 26, 2008 (CRTC 2008-129), the CRTC approved the change in effective control of TQS to Remstar. It also agreed to renew the broadcasting licences for TQS's television stations to August 31, 2015, but required that, effective September 1, 2008, TQS broadcast no less than 15 hours of local programming each week in Montréal, of which a minimum of 2 hours would be devoted to category 1 news programming, and no less than 10 hours of local programming each week in Québec, of which a minimum of 2 hours would be devoted to category 1 news programming. With respect to the stations in Estrie, Mauricie and Saguenay, the CRTC required that TQS broadcast no less than 1 hour and 30 minutes of local programming each week, of which a minimum of 1 hour would be devoted to category 1 news programming. Additionally, the CRTC required that TQS broadcast a minimum of 30 minutes of category 1 news programming every Saturday and Sunday on each of its network's stations. The decision did not, however, require that TQS produce the programming itself.

E–Start-up of Production Houses in the Regions

[40] In the summer of 2008, several production houses were started up following TQS's announcement that it was discontinuing commercial and in-house program production and its announcement that it would be shutting down its newsroom. A document dated September 21, 2009, that was entered into evidence contains admissions by three of those production houses: Projet momentum TV Inc. (Projet momentum) in Estrie, Point Bleu Productions Inc. (Point Bleu Productions) in Mauricie, and Zed Productions (9198-1688 Québec Inc.) in Saguenay. The following

is a summary of some of the admissions respecting the lay-offs and the purpose of the three companies.

i–Projet momentum TV Inc. (Projet momentum) (Estrie)

[41] The shareholders and administrators of the production company are Messrs. Sylvain Dubreuil, Paul Lefrançois and Denis Gervais. Prior to lay-off, Mr. Dubreuil was production manager for TQS Estrie and Messrs. Lefrançois and Gervais were producers with TQS Estrie. Since June 2008, Projet momentum has been engaged in particular in commercial production for clients that retain its services primarily to produce advertising to be aired on TQS and other broadcasting networks. The company brought on board several former TQS producers, editors and camera operators, among others, on freelance basis. There is no written contract between TQS and Projet momentum. Starting in mid-June 2008, Mr. Sylvain Dubreuil recommended this company to clients with commercial production needs. Since September 2008, the company has been providing the Agence de nouvelles ADN5 Inc. (ADN5) with technical and IT support as well as space for the production of news segments and the Saturday and Sunday newscasts aired by TQS in Estrie. Toward the end of September 2008, a verbal agreement was reached between the company and ADN5 regarding the range of services to be delivered to that agency. The company agreed to schedule the hours of work of the camera operators assigned to technical support according to ADN5's needs and to meet the deadlines set by ADN5 for the TQS news program schedule.

ii–Point Bleu Productions Inc. (Point Bleu Productions) (Mauricie)

[42] The shareholders and administrators of the company are Messrs. Benoît Laflamme, Éric Girouard and Pierre Lauzer. Prior to lay-off, Mr. Laflamme was the manager of TQS Mauricie; Mr. Girouard was a production technician and Mr. Lauzer, a producer, and they were covered by the certification orders issued to the Syndicat de TQS Mauricie (FNC-CSN) and the Syndicat des réalisateurs de TQS Mauricie (FNC-CSN). The company launched its video production operations in July 2008. It is engaged in commercial production for clients that retain its services primarily to

produce advertising to be aired on TQS or other broadcasting networks. There is no written contract between TQS and Point Bleu Productions. The company hired some former TQS producers and camera operators, among others. Between September 2008 and September 2009, the company provided ADN5 with the technical support needed for the production of news segments and the Saturday and Sunday newscasts. ADN5 handles the reporting side of the newscasts aired by TQS in the Trois-Rivières region.

iii–9198-1688 Québec Inc. or Zed Productions (Saguenay)

[43] The company's shareholder and administrator is Mr. François Lapointe. Mr. Lapointe was the production manager for TQS Saguenay (Jonquière) until he resigned around June 2008. He started up the television production company on or around June 11, 2008. Since about June 22, 2008, the company has been engaged in particular in commercial production for clients that retain its services primarily to produce commercials to be aired on TQS or other broadcasting networks. There is no written contract between TQS and Zed Productions. The company hired some former TQS producers, camera operators, editors and writers, among others. It provides ADN5 with the technical support needed for the production of news segments and the Saturday and Sunday newscasts that are aired by TQS in the Saguenay region.

F–ADN5 and Other Production Houses

[44] ADN5 is another company started up in the wake of TQS's announcement of lay-offs and of the imminent shutdown of its newsroom. It is a news agency launched in Montréal on August 11, 2008, by Mr. Richard Desmarais, a former TQS on-air host, and Mr. Sylvain Girard, a former TQS producer. The company began producing news to be aired on TQS toward the end of September 2008. ADN5 was initially located on TQS premises, but later moved to a new location.

[45] Les Productions 4C3 HD was also started up in 2008. The company provides ADN5 with technical support (on-location camera operators). The administrator of the company, Mr. Paul Roberge, is also a former TQS employee.

[46] The company Ms. Julie Dalbec (carrying on business as Productions Julie Dalbec) was started up in 2008 by another former TQS employee. It is engaged in particular in commercial production to be aired on TQS in Montréal and on other broadcasting networks.

[47] Speed Média is a production house started up in Québec in 2008 by two former TQS employees, Mr. Renaud Francoeur and Ms. Nathalie Fleury.

VI–Preliminary Issues

[48] On December 11, 2008, immediately after the Board's pre-hearing conference of December 3, 2008, TQS and Remstar sent the Board a number of preliminary objections relating to its jurisdiction. The Board indicated that the objections would be taken under advisement and that the parties would be given the opportunity to present their arguments in their respect during oral arguments on the merits of the matter.

[49] Some of the objections related to the bad faith bargaining complaint filed under section 50(*a*) of the *Code* and the complaint respecting the use of replacement workers filed under sections 94(2.1) and 97(1) of the *Code*. Another objection pertained to the application for review of the bargaining unit structure filed pursuant to section 18.1 of the *Code*. Finally, TQS also sought a declaration by the Board that it lacked jurisdiction over any matters flowing from the CCAA or the licensing conditions imposed on TQS by the CRTC.

[50] However, since the unions indicated that they were withdrawing all complaints other than the complaint of unfair labour practice filed under sections 94(1) and (3) of the *Code*, the matter of the bargaining structure review has been dealt with, and the matter involving the CCAA proceeded

independently of the matter before the Board, as did the complaint filed with the CRTC regarding the licensing conditions imposed on TQS, the only preliminary objection that remains to be dealt with in the instant decision relates to the allegations involving contracting out. Remstar and TQS submit that the grievance arbitrator is the only authority with jurisdiction to settle a dispute relating to the interpretation and application of the relevant provisions of the collective agreements. The Board notes in this regard that a grievance arbitrator already issued an award, on December 4, 2009, relative to the lay-off in 2008 of permanent or regular employees in Montréal, Sherbrooke, Saguenay and Trois-Rivières. The award covered only employees who were members of the CSN-affiliated unions. The grievance arbitrator allowed the unions' grievances in part, including the grievances alleging violation of the contracting-out provisions set out in the collective agreement in connection with the production of news by ADN5. However, the arbitrator dismissed the grievances relating to advertising, self-promotion and infomercials. He then retained jurisdiction with respect to remedies. The award issued by Arbitrator Denis Provençal reads in part as follows:

> **DISMISSES** the grievances alleging violation of the contracting-out provisions set out in the collective agreements of the applicant unions in connection with the programs acquired from independent producers through pre-licensing or programs or movies already produced in place of programs produced by a TQS production subsidiary following TQS's decision to discontinue hiring out its staff's services;
>
> **DISMISSES** the grievances alleging violation of the contracting-out provisions set out in the collective agreements of the applicant unions in connection with advertising, self-promotion and infomercials;
>
> **ALLOWS** the grievances alleging violation of the contracting-out provisions set out in the collective agreements of the applicant unions in connection with the production of news by ADN5 and declares that the use of ADN5 contravenes the provisions prohibiting contracting out, as it results in lay-offs;
>
> **DECLARES** that the employer failed to advise the unions that it was contracting out for news programming and that no prior discussions were held to seek an alternative;
>
> **RETAINS** jurisdiction, as requested by the parties, in regard to remedies, damages and any other relief owing to the unions or employees.
>
> (translation)

[51] That said, the *Code* contains provisions relating to unfair labour practices aimed at preventing the employer from interfering with the representation of employees and protecting the representational capacity of bargaining agents. Such provisions protect the fundamental right of

association provided for under section 8 of the *Code*. In that sense, the aim of the said provisions of the *Code* are different from the objectives of a grievance arbitrator, even though the facts behind the recourse are often the same in both cases, as is seen here. Through its section 94 provisions respecting unfair labour practice, the *Code* prohibits an employer from taking any action for the purpose of undermining exclusive union representation or the representative character of unions. The issues are not issues relating to the strict interpretation of collective agreement provisions.

[52] It must be borne in mind that, on December 23, 2008, the Board already allowed in part an application for an interim order filed under section 19.1 of the *Code*, which actually related to the complaint of unfair labour practice in the instant matter.

[53] For all of the foregoing reasons, and in light of the alleged violations of the *Code*, the Board finds that it must intervene in this matter and accordingly dismisses the preliminary objection filed by Remstar and TQS in connection with the allegations pertaining to contracting out.

VII–Complaint of Unfair Labour Practice (sections 94(1) and (3) of the *Code*)

[54] The Board's consideration and determination of the complaint of unfair labour practice is broken down into three parts: (A) the positions of the parties with respect to the evidence adduced; (B) the parties' legal arguments; and (C) the analysis and decision.

[55] The first part summarizes the oral and documentary evidence of the CSN, CUPE and the employer in support of their respective positions on the merits of the complaint of unfair labour practice. In both their oral arguments and written submissions, the parties brought forth certain excerpts taken from the oral evidence heard and the documentary evidence on file. To this end, they referred to the transcripts of the hearings held in the instant matter as well as to the exhibits entered into evidence. The Board summarizes the main points made by the parties in this regard.

[56] The Board then analyzes the legal arguments made by the parties and, finally, provides its analysis and decision.

A–Positions of the Parties with Respect to the Evidence Adduced

1–CSN-Affiliated Unions

[57] According to the CSN-affiliated unions, labour relations prior to December 17, 2007, a year before TQS sought protection under the CCAA, were sound. They refer to the testimony of Ms. Hélène Bélanger, Human Resources Manager with TQS at the time, who stated that labour relations had been relatively sound and there had been regular contact between the employer and the unions. She added that the management style of Cogeco, then owner of TQS, had been more paternalistic, which she stressed meant that the company had preferred to enter into agreements with the unions than to challenge them.

[58] Counsel for the CSN-affiliated unions submit that all of the collective agreements binding the unions and TQS when the lay-offs were announced in 2008 contained provisions preventing the employer from contracting out work normally performed by members of the bargaining unit where doing so would result in lay-offs of permanent employees. The unions refer to clause 1.04 of the collective agreement with the Syndicat des employé-es de TQS Inc. (FNC-CSN) as one example. The clause in question read as follows:

> JURISDICTION
>
> ...
>
> 1.04 Contracting out
>
> (a) The employer agrees not to contract out any work normally performed by members of the bargaining unit where such contracting out will result in the lay-off of permanent employees.
>
> (b) The employer agrees to provide the union with advance notification of any contracting out and, where applicable, to discuss alternatives to contracting out with the union.
>
> (translation)

a–Bankruptcy protection under the CCAA and lay-offs announced on April 23, 2008

[59] According to the evidence adduced by the CSN-affiliated unions, the key facts relating to the major lay-offs and the bargaining period that preceded those lay-offs may be summarized as follows:

- on March 10, 2008, the Quebec Superior Court approved an offer to purchase TQS made by Remstar Corporation and agreed to by TQS's Board of Directors and shareholders;

- on April 2, 2008, the unions requested a meeting with the "new employer" to find out its intentions;

- on April 10, 2008, Remstar, the manager, represented by Mr. Tony Porrello, met with the union representatives; according to witness Sylvain Côté, Union Advisor, Fédération nationale des communications de la CSN, Mr. Tony Porrello issued a memorandum to all TQS employees at this same time to inform them that TQS was working on a recovery or restructuring plan that would include staff cuts and measures that he indicated were crucial to the survival of the company. The internal memorandum to employees dated April 10, 2008, read in part as follows:

Internal Memorandum
For distribution to all employees

From: Tony Porrello
Manager
To: All employees
Date: April 10, 2008
Subject: TQS Turnaround Plan

It is my duty to inform you that TQS is working on a recovery plan that will include staff cuts and austerity measures that are crucial to the survival of our company. There will be a great deal of worry and perhaps bitterness in the days ahead, but the steps to be taken are necessary if TQS is to survive and get back on track as a financially viable company.

In my capacity as the manager designated by the Court and the CRTC, I will today start to meet with the heads of all the services and the representatives of the unionized staff. I plan to candidly broach

all the issues related to the recovery of TQS and am counting on everyone's cooperation to identify adjustments and concessions that can help streamline the station's operating costs.

Based on the comments and proposals received, the committee I am heading will decide on the measures that are critical to the company's recovery, and such measures will be announced in the near future.

The buyer identified, Remstar Corporation, is working closely with us in this difficult, but necessary process. Its recommendations are all geared toward achieving a speedy, vigorous and sustainable recovery of TQS's growth.

I am asking for your understanding and cooperation in working though this delicate process. I, for my part, promise to keep you informed of developments as the situation evolves.

(translation)

[60] According to the CSN-affiliated unions, the employer was not prepared to answer the unions' many questions at the meeting with union representatives on April 10, 2008. Ms. Bélanger, Human Resources Manager, indicated that few clarifications or explanations had been provided at the meeting regarding the major cuts announced by Mr. Porrello.

[61] On April 18, 2008, Mr. Porrello issued an information bulletin to all TQS employees. The bulletin read as follows:

To: All employees
From: Tony Porrello
Date: April 18, 2008
Subject: Information Bulletin

The situation at TQS since the month of December, when the company sought protection under the *Companies' Creditors Arrangement Act*, is complex and has placed a huge strain on the entire organization. In view of the circumstances, we wish to inform you that the interim management team is doing everything that is expedient and necessary to maintain normal operations while working out a careful and realistic business plan to ensure the sustainable recovery of TQS.

In the meantime, in keeping with our commitment to keep you informed, the following is a brief report on developments to date:

1. Last week, we met with union representatives to outline the company's actual financial situation.

2. At this first meeting, we were clear about the urgent need to generate savings in the cost structure in order to stop the company's operating deficit and reach the breakeven point.

3. It has been determined that, to ensure that the process is fair to all stakeholders, savings have to be

made across the board, including through adjustments and concessions in respect of working conditions.

4. We have undertaken to promptly file a draft recovery plan laying out the clauses of the collective agreements in relation to which adjustments are deemed necessary.

5. We have also undertaken to file a preliminary draft of the summer programming schedule, which will provide a first glimpse of the change in direction we are seeking for TQS, to make it financially viable again.

6. We have completed the analysis and the arguments that will be used to support TQS's position before the CRTC at the public hearings to review the regulatory frameworks for broadcasting distribution undertakings (fee issue).

7. We have started drafting the documentation and brief to be filed with the CRTC in connection with the application for the licence transfer to the disclosed purchasers of TQS.

Despite all good faith and due care, the interim management board has been unable to complete the documents needed for the meeting with the union representatives scheduled for today (April 18). The meeting has therefore been postponed until next week.

At that time, we will present the draft recovery plan described in point 4 above and answer all related questions to ensure that it is properly understood.

We will then be counting on your utmost cooperation and understanding in discussing and approving the measures sought as quickly as possible.

The next main steps are as follows:

- Response of union representatives to the measures proposed by TQS: April 25
- Deadline for filing proof of creditors' claims: April 30
- Filing of plan of arrangement with creditors: May 7
- Meeting of creditors: May 22
- Court approval of plan of arrangement: June 6

We hope that this information will prove useful, and wish to reiterate that we are committed to doing everything possible to permanently restore TQS's financial health and turn "television's black sheep" into a major success story.

Sincerely,
Tony Porrello
for the interim management board

(translation)

[62] According to witness Sylvain Côté, the above memorandum was sent to the union representatives and to TQS's employees. He stated that he had learned about the cancellation of the April 18, 2008, meeting with union representatives at the same time as the employees. According to Mr. Côté, it was not until April 22, 2008, at 4:42 p.m., that union representatives were advised by email of another meeting, to be held the very next day. The email, sent by Ms. Hélène Bélanger, read as follows:

Subject: Union meeting and conference call

We will be holding a meeting at 9:30 a.m. tomorrow, on the 2nd Floor of 614 St-Jacques for everyone in Montréal and by conference call for those outside the area.

The meeting is expected to take about 30 minutes.

(translation)

[63] At the said meeting of April 23, 2008, the employer announced to the bargaining agents that 270 permanent positions, including 224 unionized positions, were being cut. According to the CSN unions, 72% of unionized permanent employees lost their jobs. Apparently, no discussions regarding the job cuts were ever held with the unions prior to this date.

[64] On April 23, 2008, Mr. Serge Bellerose, the acting president, advised all staff that TQS management has announced that it had to cut 270 positions. The memorandum entered into evidence reads in part as follows:

From: Serge Bellerose
Acting President
To: All employees
Date: April 23, 2008
Subject: Financial turnaround plan and recovery plan
...

TQS management also hereby announces that it must cut 270 permanent staff positions. The employees concerned will receive advance lay-off notices today from their immediate line supervisors.

...

Additionally, it is important to note that, to generate further savings in operating costs, the recovery plan includes asking the CRTC to relieve TQS of its commitment to broadcast news. If the CRTC agrees, TQS will cease broadcasting news programming, a costly operation from which no profit can be made, and will eventually shut down its newsroom.

...

... Management... expects to drop newscasts with the fall 2008 programming.

(translation)

[65] Mr. Côté indicated that, at the meeting of April 23, 2008, the employer had also presented the bargaining agents with an account of "adjustments needed for the company's survival." The document entered into evidence reads as follows:

> **TQS UNION MEETING**
> **APRIL 23, 2008**
> **PRESENTATION RESPECTING ADJUSTMENTS NEEDED FOR THE COMPANY'S SURVIVAL**
>
> 1. Scope of lay-offs announced today
>
> 2. Points to be discussed with the unions
>
> - Jurisdiction and contracting out:
> Flexibility to have production work done outside the company if production costs are lower
>
> - Job descriptions
> Amendments and adjustments based on work organization
>
> - Work organization
> Scheduling, assignments, technological changes
>
> - Staff movements
> Job cuts and effective management of staff movements
> Choice of teams
>
> - Reduced operating costs
> Vacation
> Employee benefits (short-term disability and cost sharing)
> Pension Plan
> Overtime (41st hour)
> Allowances, parking and salaries and wages
>
> - Grievance process
>
> - Consolidation of bargaining certificates
>
> **Union participation in company's recovery**
>
> (translation; emphasis in original)

[66] Ms. Bélanger confirmed that union representatives had been given the above list of topics on April 23, 2008, in preparation for a bargaining meeting to be held the next day, April 24. Ms. Bélanger explained that speed had been of the essence because of the time frame that the comptroller had set for the plan of arrangement with the creditors.

b–Bargaining phase between April 24 and May 2, 2008

[67] According to the unions, there was no real "bargaining process" (translation). They submit that the employer failed to bargain in good faith in that it did not engage in a meaningful dialogue. They add that the employer failed to make a reasonable effort to work out an agreement acceptable to the unions.

[68] According to witness Éric Lévesque, CUPE president for the Québec bargaining unit, the first bargaining meeting with the employer was held on April 24, 2008, a Thursday, starting at 10 a.m. It seems that, at that meeting, the employer, represented by Mr. Luc Beaulieu, among others, indicated that the cuts announced the day before were not sufficient and that other savings would have to be found. Without producing any other documents, the employer then indicated that the collective agreements would have to be re-opened and adjustments would have to be made. The employer, also represented by Mr. Legault, apparently then asked the unions if they had a mandate to bargain, stating that it was prepared to start negotiations right away and to work through the upcoming weekend. The employer indicated to the unions that everything had to be finalized on the weekend. Mr. Lévesque stated that the unions had responded that the employer should first tell them exactly what it was seeking and then they would go to their memberships to seek a mandate to bargain. The employer's response, according to the witness, had been, "Listen, we're not negotiating anything else with you; it's okay, we're not negotiating any more. There won't be any negotiations. We're done. You can consider the matter closed." (translation). According to Mr. Lévesque, that had been late in the day on the Thursday and he had then left for Québec.

[69] According to witness Côté, the next day, April 25, 2008, the employer issued a press released titled "TQS Would Have Paid 100% of Employee Claims" (translation). The press release read in part as follows:

> 7. On April 24, TQS representatives met with union representatives for the express purpose of discussing the monetary and non-monetary adjustments deemed necessary. They were prepared to negotiate.
>
> 8. It is a fact that, right from the outset of the talks, TQS offered to pay 100% of employee claims on the express condition that the talks lead to satisfactory agreements.

9. TQS explained that the agreements, whatever their number, had to be entered into by Monday, April 28, at the latest because of the deadlines set by the Superior Court.

...

12. The unions essentially responded as follows:

...

(b) They had no mandates to bargain from their members.
(c) They demanded that the employer provide detailed proposals before they sought such mandates.
(d) They explained that a general meeting on the evening of Thursday, the 24th, or Friday, the 25th, was not possible—that only a meeting already called for Saturday, April 26, would be held.
(e) It was not possible to meet with TQS as early as Sunday morning.
(f) Talks therefore could not get underway until Monday, April 28, at the earliest.
(g) Finally, the unions stood united and there would either be nine agreements or none.

13. After some consideration, TQS replied as follows:

(a) TQS recognized and respected the unions' procedural prerequisites and timetable.
(b) TQS noted that such prerequisites and timetable were incompatible with the aim of attempting to enter into agreements by Monday, April 28.

Under the circumstances, TQS explained that no request to reopen or make adjustments to the nine collective agreements could be brought to the table and, consequently, TQS would not be making a proposal.

(translation)

[70] Witness Côté maintained that, despite the fact that TQS had decided it would not bargain, the unions had gathered their members together in a general meeting on April 26, 2008, and had obtained the mandate to engage in any negotiations aimed at carrying out a real process to reorganize the company and work with a view to turning the company and the news and production services around. Mr. Côté indicated that, on the very evening following the general meeting, he had called Ms. Bélanger to tell her that the unions had obtained a mandate to bargain and so were open to negotiations. According to Mr. Côté, the employer had contacted him the next evening to tell him that TQS was prepared to restart a bargaining process with the unions and that they should come to Montréal the next day.

[71] Negotiations resumed on April 28, 2008. The employer presented a proposal entitled "Union's contribution through temporary adjustments aimed at turning TQS Inc. around" (translation) and then apparently indicated that negotiations would have to be completed by May 2. According to Mr. Côté, the employer was seeking huge concessions, including the following:

- 18-month suspension of the collective agreement clauses respecting union jurisdiction, the notions of permanent positions, variation of the work day for part-time employees, staff cuts, hours of work, and the creation of positions (moratorium);

- elimination for the entire terms of the collective agreements of protection against contracting out, termination of pension plan, withdrawal of grievances pending, retraction of right to file grievances related to the recovery process, and waiving of rights under sections 52, 54 and 55 of the *Canada Labour Code*;

- authorization for the employer to negotiate directly with any employee with a view to reaching a mutual agreement respecting severance;

- the consideration agreed to by TQS in relation to the payment of employee claims outside the creditors' arrangement plan would be conditional on acceptance of the arrangement plan by the creditors and approval of the plan by the Court, as well as full approval by the CRTC of TQS's proposals, in particular those relating to changes to the requirement that it produce and broadcast news.

[72] Mr. Côté indicated that the unions had been flabbergasted by the employer's proposal, finding that the employer's offers made no sense—especially clause 10 of the employer's offers regarding the consideration to be given in return for the adjustments to the collective agreement and the compromises by the union. The clause in question read in part as follows:

> **10. <u>Payments and Conditions</u>**
>
> 10.1 In consideration of the adjustments made to the collective agreement and compromises agreed to by the Union, TQS will treat the following claims of employees in the bargaining unit covered by the collective agreement as Unaffected Claims under the plan of arrangement:
>
> (a) unpaid vacation time as of December 18, 2007 (minus any vacation time subsequently taken by employees);
>
> (b) banked sick days as of December 18, 2007;
>
> (c) any banked compensation for overtime as of December 18, 2007 (minus any time subsequently taken);

(d) severance benefits for laid-off employees.

10.2 Vacation time, sick days and overtime for employees not laid off will be paid in TQS's ordinary course of business.

10.3 All amounts payable to laid-off employees will be paid, without interest, according to the following terms:

(a) 30% payable 15 days following the later of the following dates: the date of approval by the CRTC of the application for change of control and renewal of the broadcasting licence with the amendments sought by TQS, or the date of separation indicated in the employee's lay-off notice (the **"First Payment"**);

(b) 30% payable six months after the First Payment; and

(c) 40% payable 12 months after the First Payment.

10.4 The consideration agreed to by TQS under this clause is subject to and conditional on acceptance of the arrangement plan by the creditors and approval of the plan by the Court, as well as full approval by the CRTC of TQS's proposals, in particular those relating to changes to the requirement that it produce and broadcast news.

(translation)

[73] Mr. Côté explained that this clause meant that the payments indicated had been conditional on the CRTC's agreement to everything the employer had been seeking, including the changes to the requirement that it produce and broadcast news, but the unions had been planning to appeal to the CRTC to maintain the news production and broadcast service across the regions. Mr. Côté maintained that, if the conditions had not been met, all of the unions' concessions would still have applied but the employer would not have paid the severance benefits.

[74] Mr. Lévesque for his part indicated that, during the talks with the employer, the unions had proposed that the agreement reached not be conditional on the CRTC's decision to agree in part or in whole to the conditions set by the employer, including the elimination of the obligation to produce and broadcast news.

[75] On April 29, 2008, the unions presented the employer with a counter-offer, suggesting among other things that benefits be paid immediately—in other words, that clause 10.3 of the employer's offer be rescinded. The counter-offer also provided that the entire agreement, including the union concessions, would be conditional on the creditors' acceptance of the plan of arrangement and the CRTC's full approval of TQS's requests. According to Mr. Côté, on the morning of April 30, 2008,

Mr. François Birtz, Engineering Manager at TQS, sent him a request to meet with the unions before noon. The meeting, held that very morning, was attended by Mr. Birtz and Ms. Bélanger, Human Resources Manager. Mr. Birtz showed the unions a PowerPoint presentation of about one and a half hours that explained what TQS could do in the area of new technology. The presentation was entitled "Plan to save TQS and shift to a different broadcasting method to secure the company's future" (translation).

[76] That afternoon, the unions were called to a meeting with the employer bargaining committee, which included Mr. Birtz. According to Mr. Côté, counsel for TQS informed them that Mr. Birtz had not been given any instructions to meet with them that morning, that he had done so on his own initiative. The employer then presented the unions with a counter-proposal that included some concessions on the part of the employer. However, the employer had maintained the condition respecting the elimination of the contracting-out clause initially proposed on April 28, 2008, as well as clause 10, regarding the conditions for and staggering of the payment of severance benefits. The employer had also added a clause respecting the introduction of a voluntary separation program and a proposal respecting the reinstatement of some eliminated positions, subject to retraction of the right to recall based on seniority for purposes of staffing those positions. The offer, which the employer termed a better offer, was deemed unacceptable by the unions and dashed the hopes that had been raised by Mr. Birtz's presentation that very morning.

[77] According to Mr. Côté, the unions prepared a counter-proposal on May 1, 2008, but it was never considered by the employer. It seems that Mr. Côté contacted counsel for the employer, who indicated that he did not have the mandate to pursue negotiations. Again according to Mr. Côté, he told the employer's representative that the unions were prepared to meet with the employer's team. When the employer did not respond, he emailed the unions' counter-proposal to the employer. Ms. Bélanger confirmed that she had received the document from the unions but added that it had not been considered by the employer.

[78] On May 1, 2008, the employer issued a press release entitled "TQS Calls on Unions to Cooperate" (translation).

[79] According to the CSN unions, the employer had used the press release to make its offers public and attempt to persuade the employees individually of the soundness of its proposal, disparaging the bargaining agents in the eyes of their members. In the guise of a press release, the employer had addressed the company's employees and attempted to "sell" its proposal the day before the meetings scheduled by the unions, which had to provide an answer on May 2, 2008.

[80] Further, according to Mr. Éric Lévesque, the press release had omitted a major detail, that is, the fact that union members had to make their decision before the CRTC ruled on the elimination of the news services. Mr. Côté pointed out that the unions had reacted to the employer's press release that same day, May 1, 2008, by sending their members an information bulletin to provide an account of the bargaining sessions held with the employer and outline the employer's last counter-proposal:

> **Hello everyone,**
>
> **We are issuing this short information bulletin to put a stop to a number of rumours that have been circulating. After several bargaining meetings since last Monday, the employer made what it termed its final counter-proposal yesterday. The unions attempted to make a further counter-proposal that would have been more acceptable to the members we represent. However, the employer's spokesperson, Mr. Luc Beaulieu, refused to meet with the unions to receive that counter-proposal. The following is a summary of the terms of the last counter-proposal received by the employer:**
>
> - suspension of the provisions of the collective agreement respecting job descriptions, staff movements and lay-offs for a period of 18 months;
>
> - at the employer's behest, rehiring of 34 people of the employer's own choosing, without reference to seniority for purposes of recall, following the lay-offs;
>
> - termination of the defined benefit pension plan; since the plan is currently in a deficit position, the amounts owed by TQS would be included in the plan of arrangement, which means that we would be giving up about $1.6 million without knowing what effect it would have on our pension benefits;
>
> - allowing of contracting out;
>
> - termination of the short-term disability plan now paid for by TQS and implementation of a plan administered by a private insurer, with defined coverage but 50% of contributions paid by the employees;
>
> - termination of top-offs to CSST benefits;
>
> - changes to the standard work day and work week and termination of overtime payments calculated on a weekly basis;
>
> - termination of paid parking benefit;

- allowance of mutual agreements respecting voluntary separation between the employer and employees;

- **IF AND ONLY IF the CRTC FULLY approves all of the licensing amendments sought by REMSTAR, the employer would pay the following amounts:** vacation pay, sick days, accumulated overtime, and severance benefits (pay equity would not be included);

- all amounts owing to laid-off employees would be paid, without interest, according to the following terms:

  - 30% payable 15 days following the date of approval by the CRTC of all the amendments sought by Remstar (or the employee's lay-off date, if later);

  - 30% payable six months later;

  - 40% payable 12 months later.

TQS unions would be consolidated into one.

(translation; emphasis in original)

[81] Mr. Côté explained that the information bulletin had also been intended to set the record straight, since members had been under the impression that the employer had made some attractive offers and had not been able to understand why the unions had not accepted them. In the end, counsel for the employer had contacted Mr. Côté on May 2, 2008, to inform him that the employer wanted to meet with the unions "pronto" (translation). At about 5:30 p.m., a meeting of all the representatives of the different unions and the employer had been held and the employer had proposed the following changes regarding the payment of severance benefits and other employee claims:

The clause entitled "Payments and Conditions" (clause 9 or 10, depending on the union concerned) [clause 10 of the aforementioned example of the collective agreement] is amended only as follows:

1. The third sub-clause (9.3 or 10.3 depending on the union concerned) will henceforth read as follows:

All amounts payable to laid-off employees will be paid, without interest, according to the following terms:

(a) 100% payable 15 days following the later of the following dates: the date of approval by the CRTC of the application for change of control and renewal of the broadcasting licence, or the date of separation indicated in the employee's lay-off notice;

2. The fourth sub-clause (9.4 or 10.4 depending on the union concerned) will henceforth read as follows:

The consideration agreed to by TQS under this clause (clause 10 or 9, depending on the union concerned) is subject to and conditional on acceptance of the plan of arrangement by the creditors and

approval of the plan by the Court, as well as approval by the CRTC of TQS's application for change of control and renewal of its broadcasting licence.

(translation)

[82] This amendment meant that the amounts claimed by employees would no longer be paid in increments, as initially planned. Further, the expression "full approval by the CRTC" in sub-clause 10.4 had been changed to "approval by the CRTC." Mr. Côté stated that, at the meeting with the employer, he had asked several times whether the severance benefits would be paid even if the CRTC or the Court failed to approve the plan of arrangement in its entirety. The employer had finally answered that "TQS Remstar will not pay the severance benefits if not all conditions are met" (translation). Mr. Côté indicated that the CSN unions had left the meeting at that point to go join their members at a general meeting called for 6:30 p.m.

[83] These last proposals made by the employer were rejected by all the bargaining units concerned at the union general meeting held on the evening of May 2, 2008. Talks with the unions subsequently broke off.

[84] In the view of the CSN unions, given the context, no real bargaining process took place. The CSN unions submit that the employer failed to bargain in good faith by engaging in a meaningful dialogue and failed to make a reasonable effort to conclude an agreement that was acceptable to the unions. In their opinion, the terms proposed by the employer were such that the unions were bound to reject them, primarily because TQS was seeking major concessions yet the proposed consideration was conditional on action by a third party, namely, a decision by the CRTC. They further submit that the employer failed to bargain in good faith by, among other things, making illegal proposals regarding the elimination of job protection clauses and clauses respecting contracting out and by adding an illegal condition that was contrary to the *Code* or a condition that was completely unfair, unjustifiable or unreasonable, that is, the waiver of the protection provided under sections 52, 54 and 55 of the *Code*. Additionally, the CSN unions submit that the employer broke off all talks with the unions after they rejected the employer's final offers and maintain that it violated the *Code* by entering into direct contact with the employees regarding the negotiations underway, thereby interfering with the exclusive power of the certified bargaining agents to represent the interests of their members.

c–Period following failure of intense bargaining and clauses respecting contracting out

[85] According to the unions, starting on May 2, 2008, following the failure of negotiations with the employer and the unions' refusal to allow the clauses respecting contracting out to be dropped as proposed by the employer in its offers, TQS knowingly sought to achieve its bargaining objectives by itself by negotiating specific agreements directly with employees in the regional stations without the consent of the unions. The period in question was around mid-May 2008. The CSN unions' position in this regard is set out below, along with the oral evidence to which they refer.

i) TQS Estrie

[86] According to Mr. Jean Devoy, a producer with TQS Estrie and president of the Syndicat des employé-es de TQS-Estrie - FNC-CSN, he did not hear any more about the issue of severance benefits for TQS employees until around the end of May 2008, when Mr. Sylvain Dubreuil, to whom he reported, asked to speak with him. Mr. Dubreuil apparently told him, "You know, Jean, it's because of the contracting-out clause that you people are not getting your severance benefits." He then asked, "Would you be prepared to negotiate?" but added, "I personally can't do anything; I'd have to talk to Mr. Cloutier; he's the one who deals with those kinds of things" (translations). According to Mr. Devoy, Mr. Cloutier met with him the next day in the presence of Mr. Dubreuil and told him, "You people could get your severance benefits if you agreed to drop the contracting-out clause" (translation).

[87] Mr. Devoy indicated that Mr. Cloutier had told him that the deal had to be kept secret. Mr. Cloutier had apparently said, "What we can do is let you artificially inflate bills; in other words, if you do a contract worth a thousand dollars ($1,000) for a client, you can get two thousand ($2,000). Of course, the bill doesn't go to the client, but to TQS" (translation).

[88] Again according to Mr. Devoy, Mr. Dubreuil subsequently asked to meet with the producers concerned. All of the producers concerned by the lay-offs and one editor attended the meeting, which was held the following afternoon. Mr. Dubreuil apparently told them that, if the producers dropped

the contracting-out clause, they would be given "re-hiring" (translation) priority after they lost their jobs. Mr. Devoy indicated that the meeting had lasted about 20 minutes.

[89] A short time before this meeting on May 20, 2008, Mr. Devoy was given a document emanating from Mr. Cloutier's office that explained the waiver sought by Mr. Cloutier. It read as follows:

> May 20, 2008
>
> Mr. Michel Cloutier, General Manager
> TQS Inc.
> 3720 Industriel Boulevard
> Sherbrooke, QC J1L 1Z9
>
> **SUBJECT: Waiver of union right**
>
> Dear Sir:
>
> The Union and its duly authorized representatives hereby wish to advise you that they are waiving in its entirety clause 1.04(b), titled "*Union jurisdiction*," of the collective agreement in effect.
>
> Accordingly, effective **June 2, 2008**, the said clause will officially be dropped from the collective agreement of the Syndicat des employés de TQS Estrie (FNC-CSN), in respect of all commercial and program production.
>
> We acknowledge that the producers, editor and advertising copywriters of TQS Estrie who will become freelancers effective June 2, 2008, will be given priority when production work is assigned.
>
> Sincerely,
>
> Jean Devoy, Producer /
> President, Syndicat des employés
> de TQS Estrie (FNC-CSN)
>
> Jean Thibault, Producer /
> Secretary, Syndicat des employés
> de TQS Estrie (FNC-CSN)
>
> (translation)

[90] Witness Jean Thibault also attended the meeting at which Mr. Dubreuil allegedly made the proposal about dropping the contracting-out clause in return for the payment of severance benefits. He was a producer working on commercial production at TQS Estrie and was Secretary of the Syndicat des employées de TQS-Estrie - FNC-CSN. According to Mr. Thibault, the employer had shown some openness with respect to severance benefits, but only under certain conditions. Mr. Dubreuil had apparently indicated that laid-off employees would be able to work for TQS as freelancers and would be given priority by TQS. Mr. Dubreuil had allegedly stated that severance benefits would be paid through inflated billing. According to Mr. Thibault, those offered this deal

had had to decide quickly, since TQS had been in talks to commission production houses. Mr. Thibault confirmed that he had received the document reproduced above shortly before the meeting.

ii) TQS Mauricie

[91] Witness Serge St-Arnaud was a full-time producer with TQS Mauricie, producing newscasts and advertising. Mr. St-Arnaud stated that he had heard nothing more about the severance benefits until mid-May, when Mr. Benoît Laflamme, Manager of TQS Mauricie, had called him and Mr. Pierre Lauzer, also a producer with TQS Mauricie, to a meeting. Mr. Laflamme had allegedly told them that the employer was prepared to pay them their severance benefits in return for their dropping the contracting-out clause. Mr. St-Arnaud apparently asked what form the payment would take and Mr. Laflamme answered that he did not know but, speaking directly to Mr. St-Arnaud, added, "All I know is that it means that you go home and you'll... until the end of August, and you'll be paid for fifteen (15) hours a week" (translation). He told Mr. St-Arnaud to talk to Mr. Michel Cloutier about next steps. According to Mr. St-Arnaud, he later met alone with Mr. Cloutier. The meeting was fairly long, and Mr. Cloutier offered to pay him for full-time work until the end of August 2008 without his having to work. He also apparently offered him an additional sum of $25,000, to be paid through a future independent business belonging to Mr. Benoît Laflamme. However, it seems that Mr. Laflamme was not willing to go along with this. Other conversations ensued with Mr. Cloutier, who apparently offered to pay Mr. St-Arnaud through inflated billing—in other words, he could regularly send bills for $3,000 to $3,500 to Mr. Arnaud at TQS in respect of client invoices for $1,300 or $1,400, as a means of getting an initial $20,000 in partial compensation for the severance benefits.

[92] Mr. St-Arnaud indicated that in the end he had not been paid for 37.5 hours while staying home, as had been agreed to with Mr. Cloutier, since shortly thereafter, that is, a week later, Mr. Cloutier had called to tell him that TQS in Montréal would not allow the deal and he had to return to work on the news for at least 15 hours a week. According to Mr. St-Arnaud, that had been in early June 2008. At that time, Mr. St-Arnaud had informed Mr. Cloutier that he was recording the conversations with him in regard to this matter.

[93] According to Mr. St-Arnaud, other conversations took place with Mr. Cloutier in regard to agreements for exchanges with TQS business partners. It seems that there was talk about a possible car lease, a bathroom, clothing and furniture provided as a way to pay the severance benefits. Finally, according to Mr. St-Arnaud, Mr. Cloutier informed him on July 25, 2008, that he had received approval from Mr. Porrello in Montréal to go ahead with the deal. Two documents entered into evidence show, first, an agreement with Mr. Cloutier for a $28,000 swap agreement benefiting Mr. St-Arnaud in return for a waiver of any grievances or other remedies. The document in question, dated August 2008 according to the oral evidence, was initialled by Mr. St-Arnaud and Mr. Cloutier. Also entered into evidence were two grievances dated July 25, 2008, and signed by Mr. St-Arnaud on behalf of the Syndicat des réalisateurs de TQS Mauricie (FNC-CSN).

[94] Mr. St-Arnaud explained that the sum of $28,000 had covered a car, at a cost of $21,000, including taxes, plus a bathroom renovation, at a cost of $7,000.

[95] Witness Pierre Lauzer was a producer with TQS Trois-Rivières and Secretary of the Syndicat des réalisateurs de TQS Mauricie (FNC-CSN) at the time of the events described. He stated that he had not heard talk of severance benefits again until after the meeting of May 2, 2008, though he could not provide the exact date. He had heard from Mr. St-Arnaud that severance benefits might be paid—or at least that that was what was being said in Estrie. It seems that Mr. Lauzer had spoken with Mr. Cloutier and had been told that severance benefits might be paid to the producers of TQS Mauricie in return for a waiver of the contracting-out clause or the entire collective agreement. Mr. Lauzer explained that he had refused to sign anything whatsoever or to waive anything whatsoever at that time and that the offer had fallen by the wayside.

iii) TQS Saguenay

[96] Witness Patrick St-Pierre was a producer in Saguenay (Jonquière) who produced advertising, television shows and newscasts. He stated that, around May 13, 2008, he and the production staff had been called to a meeting with the employer. According to Mr. St-Pierre, the meeting had been held in the TQS offices in Saguenay (Jonquière) and had been called by Mr. Martin Gagnon,

Manager of TQS Saguenay. Again according to Mr. St-Pierre, the union was not invited to the meeting. Given that he was president of the union, the union was represented, but it was not in that capacity that he had been invited. He had been invited in his capacity as a producer. One other employee who was a member of the union executive also attended the meeting, but again, she had been called in her capacity as the production coordinator.

[97] According to the witness, at the meeting, Mr. Gagnon proposed that the seven members of the production department team drop the contracting-out clause in their collective agreement in return for contract work. Mr. Gagnon apparently also indicated that TQS was prepared to lend them the equipment and facilities they needed to start up their own business, for a period of one year, and added that their severance benefits would be paid by means of double-billing; in other words, they would be allowed to bill $2,000 for a $1,000 contract until such time as their respective benefits were paid. Mr. St-Pierre indicated that this offer had not been made to all members of their bargaining unit—only to the seven members of the production department team.

[98] Mr. St-Pierre stated that everyone who had attended the meeting had spoken up and each had indicated that the seven of them alone could not decide the fate of the collective agreement contracting-out clause without consulting all of the employees concerned. They had therefore declined Mr. Gagnon's offer.

[99] Witness Jean-Marie Munger, also a producer with TQS Saguenay, confirmed the oral evidence given by Mr. St-Pierre. No other witness contradicted their testimony.

iv) Testimony of Mr. Michel Cloutier

[100] Mr. Michel Cloutier was called as a witness by the CSN-affiliated unions. At the time of his testimony, he was Vice-President in charge of Regional Stations, TQS. In that capacity, he had been responsible for the Estrie, Mauricie, Québec and Saguenay stations since 2008. He had worked for TQS since 1991. When TQS had been placed under the protection of the CCAA, Mr. Cloutier had been reporting directly to Mr. René Guimond and, subsequently, to Mr. Serge Bellerose, the acting president until August 2008. When Mr. Maxime Rémillard had been appointed president in

September 2008, Mr. Cloutier had reported to Mr. Tony Porrello, Executive Vice-President. Mr. Porrello had apparently placed him in charge of the Québec and Saguenay stations around March or April 2008. Prior to that time, he had been in charge of only the Mauricie and Estrie stations. Mr. Cloutier indicated that he had learned from Mr. Porrello in April 2008 that commercial production was being discontinued at TQS because it was not making any money. Mr. Cloutier admitted that, despite efforts to cut costs as much as possible and keep commercial production in-house in the region, no profit was being made.

[101] As the person who had been in charge of the regional stations, Mr. Cloutier remembered the massive lay-offs announced on April 23, 2008, and slated to take effect in June and August 2008. The lay-offs had been in the news and commercial production sectors.

[102] In regard to Mr. Serge St-Arnaud, a news producer for TQS Mauricie, Mr. Cloutier explained that he had made a deal with him because his co-workers at the station had not wanted to work with Mr. St-Arnaud in an independent production company that might be set up once they were laid off. Mr. Cloutier had accordingly initially proposed that Mr. St-Arnaud would be able to stay home starting on June 1, 2008, the first effective date of the massive lay-offs, but be paid for 35 or 37.5 hours a week until August 30, 2008. However, in a telephone conversation with Ms. Bélanger, Human Resources Manager, he had been informed that he could not make such a deal and that Mr. St-Arnaud would have to return to work producing newscasts. Mr. St-Arnaud had consequently returned to work and had worked 15 hours a week, but had been paid for 35 or 37.5 hours a week until August 30, 2008.

[103] In response to a question by counsel for the CSN unions as to the reasons for that deal, Mr. Cloutier at first stated that, following the employer's announcement that in-house commercial and news production was being discontinued, Mr. Benoît Laflamme, then manager of TQS Mauricie, had gone to see him and asked him what he thought about his starting up his own commercial production company. Mr. Cloutier had said that he couldn't see any problem; on the contrary, he would help him and any other employees deciding to take such a step, since TQS would need the services of independent production houses in the future. Mr. Cloutier added that he had even told Mr. Laflamme that he would try to help them procure some TQS equipment at lower cost and send

them clients already doing business with TQS. Mr. Cloutier added that he had mentioned this conversation with Mr. Laflamme to two employees in Mauricie, Messrs. Pierre Lauzer and Éric Girouard.

[104] According to Mr. Cloutier, shortly afterwards, Mr. St-Arnaud had come to him to complain, saying that "you're helping the others...you're going to get them equipment" (translation) (speaking of Messrs. Lauzer and Girouard). Mr. Cloutier had apparently then suggested to Mr. St-Arnaud that he go to work with Messrs. Girouard and Lauzer, saying, "Look, you can pad the invoices a bit—I'll help you get your money" (translation), referring to the unpaid severance benefits. Mr. Cloutier indicated that he had also offered to compensate Mr. St-Arnaud by giving him advertising for his wife's business, clothing, computers, and so on. It seems that Mr. St Arnaud had said that he needed a new car and Mr. Cloutier had told him that he would see what could be arranged. Mr. Cloutier had told Mr. St-Arnaud that he would check with Mr. Tony Porrello, the vice-president in charge of finance at TQS. According to Mr. Cloutier, he had succeeded in persuading Mr. Porrello by telling him to let him be, since it would not cost the company anything since the car in question was being swapped for airtime for the company supplying it. Mr. Cloutier admitted to having prepared an agreement and added that he had said the following to Mr. St-Arnaud regarding contracting out: "Look, let's just drop it. We're not gonna talk about it any more. We're gonna deep six it, because there isn't going to be any more. There are two of you" (translation).

[105] Mr. Cloutier indicated that he himself had drafted the agreement in August 2008 and had had Mr. St-Arnaud sign it. He admitted that he had then wanted to make up for the advantages enjoyed by Mr. St-Arnaud. He added that he had not wanted to challenge the value of the producer unit in Mauricie and had had the impression that, while his bosses had given him instructions to help them, he had actually been doing more harm than good. And in the face of the pressure brought to bear by Mr. St-Arnaud, who was always demanding more to compensate for his unpaid severance benefits, Mr. Cloutier had said, "Look, at least give me the contracting out in return" (translation). With regard to the bargaining unit represented by the Syndicat des employées de TQS - Estrie - FNC-CSN, Mr. Cloutier testified about a draft letter that had indicated that the union would waive clause 1.04(b) of the collective agreement, titled "Union jurisdiction," which related to contracting out, and that the TQS Estrie producers, editor and advertising copywriters who would become freelancers on June

2, 2008, would be given priority when production work was contracted out. Mr. Cloutier maintained that he was not the one who had prepared the draft letter in question. He thought it might have come from Mr. Jean Devoy or Mr. Jean Thibault. He maintained that, in discussing the future of the employees, he had told Jean Devoy, a producer at TQS Estrie, and Sylvain Dubreuil, Production Manager at TQS Estrie that "the solution would seem to be that they become freelancers, at Jean Devoy's suggestion—that way, everybody would be able to work. So, what that meant was that our producer, our production manager in Sherbrooke, would give production requisitions to producers who had become or would become freelancers. They could keep doing their work, since they would be paid on the basis of the production work done and, again, airtime given to our clients, to maintain the same approach." He had apparently also said that "It will make up for the losses, for the bonuses you were expecting but never received because negotiations apparently failed, and it will allow you to keep your jobs." According to counsel for the CSN, however, the draft letter could not have been written by Jean Devoy and/or Jean Thibault, respectively the president and secretary of the Syndicat des employés de TQS-Estrie - FNC-CSN.

[106] As for the general context, Mr. Cloutier admitted that he had learned from his superiors around the third week of April that the news and commercial production services were to be eliminated. However, Mr. Cloutier had not been involved in the bargaining between the employer and unions that had taken place between April 24 and May 2, 2008. He stated that he had not had anything to do with those negotiations.

d–Commercial production in the regions after June 2008

[107] Commercial production essentially consists in the production of advertising. According to the CSN-affiliated unions, in the summer of 2008, at the same time that the failed attempts to negotiate directly with employees in the Estrie, Mauricie and Saguenay regions were being made, three production companies were launched in those regions: Projet momentum TV Inc. (Projet momentum) in Estrie, Point Bleu Productions Inc. (Point Bleu Productions) in Mauricie, and Zed Productions (9198-1688 Québec Inc.) in Saguenay. According to the CSN unions, each of these companies had a former TQS production manager at its head: Mr. Benoît Laflamme in Mauricie, Mr. Sylvain Dubreuil in Estrie and Mr. Martin Gagnon in Saguenay. Additionally, each of them had

on its staff former TQS producers, camera operators, sound engineers and editors who had been laid off.

[108] According to the CSN unions, TQS and the companies in question had refrained from entering into any written contracts so as to avoid leaving a paper trail. Witness Michel Cloutier stated that there had been no written contracts between the production companies mentioned above and TQS, although a contract had been signed with a production company launched in Québec called Speed Média. Mr. Cloutier explained that commercial production in Québec had not been covered by the collective agreement of the bargaining unit represented by CUPE in Québec, but had been contracted out to freelancers. He maintained that Speed Média in Québec had wanted assurance that TQS would send it its clients whenever possible. He had therefore signed a contract with Speed Média to reassure one of the company's managers. The contract between Speed Média in Québec (Productions du Gémeau Inc.) (Gémeau Inc.) and TQS Québec was entered into evidence. Mr. Cloutier maintained that he had not signed any contract with the three companies in the regions other than Québec as he had not believed that there was any need for him to sign a contract that TQS saw as "risking having to do business with them alone or obliging our clients to do business with them" (translation).

[109] In the view of the CSN unions, the evidence heard shows that, from the TQS clients' viewpoint, things were the same before and after the company was placed under the protection of the CCAA. Clients received the same commercial production services. The referral method for commercial production requisitions from TQS clients was the same for all regions. In their view, the only thing that could explain the lack of written contracts between TQS and the producers in regions other than Québec was the fact that there had been no protection under the collective agreement in the latter region.

[110] The CSN unions submit that the production houses in the regions do production work exclusively for TQS—for example, the promotional clips called "*TQS en action*." They entered into evidence Projet momentum's production records for June 6, 2008, through March 26, 2009, submitting that TQS is not shown as the client on any of them. They also entered into evidence Point Bleu Productions' production records for September 9, 2008, through April 27, 2009, again submitting that TQS is not shown as the client on any of them. According to the oral evidence given

by Mr. Renaud Francoeur in his capacity as head of Speed Média in Québec, TQS had asked Speed Média to consolidate the invoices from all the producers in the region into one, take 5% in administration fees, and re-bill TQS. Producers in the regions thus did not bill TQS directly, but rather billed Speed Média. The CSN-affiliated unions maintain that TQS used this ploy to disguise the production orders it was placing with commercial production companies in the regions.

e–News production

[111] According to the CSN-affiliated unions, news production was illegally contracted out to ADN5. The unions refer the Board to the award of December 4, 2009, by Arbitrator Denis Provençal, which allowed some of the unions' grievances alleging violation of the contracting-out provisions in the CSN-affiliated unions' collective agreements, in relation to news production by ADN5. In the award, the arbitrator indicates that the use of ADN5 breached the provisions against contracting out, since it resulted in lay-offs.

[112] According to witness Richard Desmarais, ADN5 was founded on August 11, 2008. Mr. Desmarais is an ADN5 administrator and shareholder, and Mr. Sylvain Girard is an administrator. Mr. Desmarais previously worked for TQS as an on-air host, while Mr. Girard worked for it as a producer. Mr. Desmarais explained that he had first come up with the idea for ADN5 when TQS had started having financial difficulties in 2007–08, that is, when it had sought protection under the CCAA, and the idea had grown when the CRTC had ordered TQS to maintain its news services. He indicated that ADN5 had started producing news to be broadcast on TQS toward the end of September 2008. ADN5 had been operating on TQS premises at the time, but had subsequently moved.

[113] Mr. Desmarais added that productions to be broadcast on TQS had been bought by Nexzo, a technical producer of the morning program in which the news segments had been broadcast. He also stated that Nexzo had provided it with the equipment required to produce the news segments (editing rooms, etc.). He added that there had been no written contract between TQS and ADN5 or between Nexzo and ADN5. He explained that he had also taken charge of the production of local and regional news in Sherbrooke, Trois-Rivières and Saguenay in conjunction with the regional producers and

that, around August 2009, ADN5 had acquired the equipment needed to produce the news segments directly, without Nexzo's assistance. According to Mr. Desmarais, ADN5 produces news segments both in Montréal and in the regions (Estrie, Mauricie, Saguenay and Québec). He explained that, in Montréal, it works with Les Productions 4C3 HD for the technical support aspect, that is, the services of the camera operators. There is a written contract between Les Productions 4C3 HD and ADN5. Mr. Paul Roberge, a former TQS employee, represents Les Productions 4C3 HD and is also the director of the company.

[114] Mr. Desmarais explained that he works with the small production houses in the regions: Projet momentum in Sherbrooke, Point Bleu Productions in Trois-Rivières, Zed Productions in Saguenay and Speed Média in Québec. He also mentioned Nexzo's role, stating that the company handles the final editing of the productions.

[115] According to the CSN unions, despite its failed attempts to negotiate diminished obligations under the collective agreements, TQS went ahead with arrangements to place its news production operations out of the unions' jurisdiction. The CSN unions submit that TQS clearly no longer wanted to be bound by the collective agreements and acted as though the bargaining agents did not exist.

f–Equipment required for production work

[116] The CSN-affiliated unions submit that TQS provided Mr. Richard Desmarais of ADN5 with $218,000 in financing, through 9068-3897 Québec Inc., and that the latter in turn financed all the regional producers in order that they might set up their companies to do commercial production work for TQS clients and produce news material to meet TQS's broadcasting licensing conditions.

[117] In his testimony, Mr. Richard Desmarais confirmed that he had purchased the equipment from TQS to enable the regional companies to fulfill their mandate with ADN5. He indicated that he had then resold the equipment in lots to the regional production houses (Les Productions 4C3 HD, Speed Média, Projet momentum and Point Bleu Productions).

[118] According to Mr. Pierre Lauzer, of Point Bleu Productions, his company was launched in July 2008, but had no equipment to do any commercial production work. It was asked to do some commercial production work for a KIA client of TQS and was given authorization to get some equipment from the TQS studios. At the time of Mr. Lauzer's testimony in April 2009, payment had not yet been made for the equipment. According to Mr. Lauzer, the agreement regarding payment for the TQS equipment was between Point Bleu Productions and a leasing company. Initially, the relationship had been with the company owned by Mr. Richard Desmarais, which apparently is the company with which TQS dealt for the sale of its equipment.

g–Consolidation of positions from two separate bargaining units and direct negotiations with employees

[119] The CSN-affiliated unions submit that the consolidation of the producer and editor positions, which came under two separate bargaining units, was achieved without the consent of the unions concerned, and that the employer then negotiated directly with the employees.

[120] According to the oral evidence given by Ms. Cynthia Ouellet, Secretary of the Syndicat des employé-e-s de l'ingénierie de TQS Inc. (FNC-CSN), a post-production editor who was a member of her union telephoned her to tell her that his immediate supervisor had called him into his office to offer him a producer-editor position even though, according to Ms. Ouellet, self-promotion producers were represented by the Syndicat des réalisatrices et réalisateurs en auto-publicité de TQS Inc. (FNC-CSN) in Montréal. The editor apparently told her that there had been no union representative at the meeting. Ms. Ouellet stated that labour-management meetings had subsequently been held, in June 2008, and the employer had sent both unions concerned information about a pilot project involving the consolidation of the positions in question for a six-week period. It seems that the union signified its disagreement to the employer and the project stalled.

[121] Again according to Ms. Ouellet, at the same time that the post-production editor referred to above was offered a position as a producer-editor, Mr. Patrick Handfield, also a post-production editor prior to the massive lay-offs, was also offered a position as a producer-editor by the employer. Ms. Ouellet indicated that Mr. Handfield had informed her that he had been given a job description,

which he had read to her over the phone. According to Ms. Ouellet, the job description had sounded very similar to the pilot project that had been rejected by the unions in June 2008.

[122] Ms. Ouellet explained that, at her request, the employer had finally invited the unions to a meeting on November 5, 2008, to explain its intentions respecting the consolidation of the producer and editor positions. Ms. Ouellet testified that Mr. Handfield had become a producer-editor in early November 2008 even though the agreement between the unions and the employer respecting the consolidation of the positions had not been concluded until April 2009. Mr. Patrick Handfield corroborated Ms. Ouellet's testimony that he had started working as a producer-editor on November 3, 2008.

[123] Finally, the CSN unions allege that, in October 2008, the employer made two producers individual offers respecting voluntary separation that were more attractive that those provided for in the collective agreement, without the written consent of the Syndicat des réalisatrices et réalisateurs en auto-publicité de TQS Inc. (FNC-CSN).

2–CUPE

[124] CUPE is a co-applicant in the instant matter. It represents a bargaining unit at the Québec station (CFAP-TV (TQS-Québec)). According to Mr. Éric Lévesque, the union president, about 48 permanent and some 20 casual employees were members of the bargaining unit prior to the massive lay-offs of 2008. At the time of Mr. Lévesque's testimony on November 17, 2009, the bargaining unit had only one member remaining. Mr. Lévesque explained that over 90% of the jobs of employees in the bargaining unit had been connected with the newsroom at TQS. The unit's members had produced the daily newscasts, among other things, and had also produced a noontime newscast in conjunction with the Montréal station.

[125] CUPE submits that, prior to the lay-offs of 2008, members of the unit it represents produced the local programming; since September 2008, the work has been done by workers outside its bargaining unit. In his testimony, Mr. Lévesque provided a detailed description of the events surrounding the intense bargaining with representatives of the employer in the spring of 2008. He

took part, either in person or by telephone, in a number of the meetings described by the CSN unions. Indeed, most of Mr. Lévesque's testimony was given in the context of the position laid out by the CSN-affiliated unions with respect to the evidence.

[126] CUPE also called Mr. Renaud Francoeur as a witness. Mr. Francoeur had started working for TQS in 1989 as a production and promotion manager. At the time of his lay-off in 2008, he had been general manager of CFAP-TV (TQS Québec), a position he had held since 1998. In his capacity as a general manager, he had been involved in the negotiation of two collective agreements, including the last agreement, in 2007, two weeks before TQS had sought protection under the CCAA. Mr. Francoeur stated that he had learned of the closing of the Québec newsroom on April 23, 2008, the day after his own lay-off.

[127] In the days following his lay-off, Mr. Francoeur had contacted Ms. Nathalie Fleury, Production Manager at TQS Québec, who had also been laid off, with a view to starting up a commercial and news production company. They had met with the station head, Mr. Steve Hayes, to offer him their services. At first, the company had been supposed to do commercial production work for TQS clients. Since they had lacked equipment, TQS had leased them space and allowed them to use its equipment. An agreement had been reached between TQS Québec and Productions du Gémeau Inc. (Gémeau Inc.), a company formed by Mr. Renaud Francoeur and Ms. Nathalie Fleury. Mr. Francoeur confirmed that the company was also called Speed Média. The agreement, which was entered into evidence, shows that Gémeau Inc. undertook to produce commercials and programming for all clients referred by TQS Québec. The agreement also shows that Gémeau Inc. undertook to pay 50% of the fees for the use of the production and post-production equipment for commercial production and program production work for clients referred by TQS Québec, based on a fee schedule, for the first four months of the agreement, after which it would assume 100% of the fees. The agreement also shows that TQS Québec undertook to refer all requisitions for production work to Gémeau Inc. (Speed Média).

[128] Mr. Francoeur also explained how the billing works with TQS Québec and added that Speed Média uses the services of freelancers for commercial production work.

[129] Mr. Francoeur also stated that ADN5 had contacted his associate in late August or early September 2008 in regard to the provision of technical services for the production of news reports and news segments for TQS. Mr. Francoeur indicated that they had agreed to the proposal and had sought out the technical services of former TQS employees who had been laid off. According to Mr. Francoeur, the employees in question are permanent employees— in other words, they work on a regular basis. Unlike the people who work on commercial productions, they are not freelancers. Working conditions were established individually and the conditions of the old collective agreement are not applicable.

[130] Mr. Francoeur also explained that they had purchased equipment from TQS. They had initially talked with Mr. Birtz at TQS and then with Mr. Richard Desmarais, who owns a holding company, 9068-3897 Québec Inc., with which Speed Média had dealt. An agreement entered into evidence shows that 9068-3897 Québec Inc. did in fact purchase from TQS technical equipment that had come from the different TQS stations, including the Québec station.

[131] Mr. Francoeur indicated that his company had purchased some $22,000 worth of equipment from the company owned by Mr. Desmarais. He stated that he did not know why the equipment had not been purchased directly from TQS. He indicated that he had paid for the equipment in monthly installments. According to documents produced by his counsel, the last installment had been made on June 1, 2010.

[132] With respect to the provision of technical services for ADN5, Mr. Francoeur stated that Speed Média had received an advance of $10,000. The services provided to ADN5 were technical services for the production of news segments for TQS, such as cameras, lighting, sound, vehicles, computers and software for editing and sequencing, along with the necessary staff. According to Mr. Francoeur, production was directed by an ADN5 news desk editor who worked on the premises of Speed Média. Mr. Francoeur stated that no written agreement had been entered into with ADN5, although he would have preferred to have such an agreement.

[133] Mr. Francoeur told the Board that about 50% of Speed Média's business is connected with the production of news for TQS and the rest comes from commercial production work for TQS clients or outside clients.

[134] Mr. Francoeur also explained that all invoices from the regional production houses for the production of promotional clips for TQS, including the "*TQS en action*" clips, were consolidated by Speed Média. This was explained in the context of the position set forth by the CSN-affiliated unions with respect to the evidence.

3–Employer

[135] Following the same procedure it used for the positions of the CSN-affiliated unions and CUPE, the Board will not reproduce the employer's position with respect to the evidence in its entirety. Only the key points of evidence relating to the complaint of unfair labour practice to which the employer drew the Board's attention in its arguments will be outlined below.

[136] The employer begins by submitting that, in analyzing the complaint in the instant matter, the Board must always keep in mind the circumstances faced by the parties in 2008, which, in its view, involved much more than mere financial difficulties. It argues that the Board must start by considering the urgent context in which the company found itself and the numerous interests it had to reconcile, in a delicate balancing act, to ensure its survival. The employer also submits that the Board must take into account the exceptional nature of the CCAA and the fact that the criteria relating to unfair labour practices established by case law have to be adapted to this context.

a–Background and TQS's financial difficulties

[137] The employer called Mr. Serge Bellerose, Acting President of TQS from April to September 2008, to describe the singular circumstances in which TQS found itself at the time concerned by the complaint. Mr. Bellerose was hired by TQS in March 2007 as Vice-President in charge of Corporate Affairs and New Media. His work primarily involved dealing with a number of regulatory and corporate matters. He had previously worked for TVA. At the time he joined TQS, the shareholders

were Cogeco and CTV. He reported directly to Mr. René Guimond, President of TQS at the time. According to Mr. Bellerose, when he started work for TQS, the dominant player in general broadcasting was TVA, with the Canadian Broadcasting Corporation (CBC) and TQS lagging far behind. He added that TQS had ranked third at the time of the financial difficulties. He explained that the arrival on the scene of specialty broadcasters such as RDS and *Canal vie* had also eaten into the general interest broadcasting market and that the television market is currently extremely fragmented. He indicated that the growing number of specialty channels had had a definite impact on available inventory in terms of advertising. This meant that there was fierce competition for advertising revenues. He added that TQS had fallen behind in terms of operating in a multi-platform environment, particularly the Internet, and it had been difficult for it to go up against TVA and CBC in the area of news programming.

[138] The employer further submits that the disaffiliation of the CBC in the regions had a major impact on TQS, referring to the fact that TQS had had an affiliation agreement with the CBC whereby the CBC broadcast its programming using TQS's facilities and broadcasting licence in the Estrie, Mauricie and Saguenay regions. In 2007, the CBC announced that it intended to disaffiliate itself from the regional stations as of March 2009. The employer submits that this affected the profitability of the regional stations.

[139] The employer also called Mr. Bellerose to testify about the company's financial difficulties. Mr. Bellerose explained that TQS had almost always run a deficit, except for a period of about two or three years in the early 2000s. In 2007, when the shareholders saw that TQS's position was worsening, they asked that a turnaround plan be worked out. Mr. Bellerose indicated that, with the assistance of outside consultants, he had drawn up a restructuring and growth plan for TQS, which had been submitted to the two shareholders at the time, CTV and Cogeco, on September 14, 2007. Mr. Bellerose provided a broad outline of the extensive document, which discusses TQS's inability to achieve the financial returns sought with the existing business model in the existing context within the industry. Mr. Bellerose testified that the restructuring plan had set out three options:

- convert TQS into a superstation in Montréal and close all the regional stations;
- turn TQS into a specialty service; or

- retain the general interest focus but carry out a programming review.

[140] According to Mr. Bellerose, the third option was chosen. However, that option meant cutting about 118 positions by introducing multi-function positions. Mr. Bellerose explained that, in the end, the two shareholders had chosen to sell the station rather than reinvest capital. When they could not find any interested buyers, they decided to petition for protection under the CCAA, on December 18, 2007.

[141] According to the employer, the different unions at TQS had joined forces as early as the fall of 2007 to face the crisis, referring to the testimony of Mr. Sylvain Côté confirming that the unions had already been aware of TQS's financial difficulties, since there had been a first wave of 40 lay-offs in the fall of 2007.

[142] The employer explains that the initial order issued under the CCAA by the Quebec Superior Court on December 18, 2007, provided for measures to facilitate restructuring of TQS's commercial operations, including the possibility of terminating employment and laying off employees. It points out that, at paragraph 22, the order also provided as follows with respect to severance benefits:

> ... to the extent that any amounts in lieu of notice, termination or severance amounts or other amounts in respect thereof are not paid in the ordinary course of business, make provision in this regard in the Plan, as the Petitioners may determine...
>
> (translation)

b–Remstar's entrance on the scene and findings respecting the crisis faced by TQS

[143] Mr. Maxime Rémillard has been Co-President and CEO of V INTERACTIONS Inc. (formerly TQS) since September 2009. In his testimony, he explained the context in which his company, Remstar, had made a first offer to purchase TQS, which had originally been turned down. He indicated that a second offer had been made to the comptroller for TQS, Mr. Yves Vincent (of RSM Richter Inc.), and that that offer had been accepted by TQS's board of directors and shareholders on March 5, 2008. The Superior Court had approved the offer on March 10, 2008, and the management contract between Remstar and TQS had then been signed on March 14, 2008.

[144] According to Mr. Rémillard, at the time the purchase offer was accepted, the company was losing between $1.2 million and $1.5 million a month, and sometimes more. Mr. Rémillard indicated that he had retained the services of Pricewaterhouse Coopers Inc. (PWC) to perform an in-depth analysis of the company's financial viability difficulties. PWC's analysis was filed in evidence as a confidential exhibit.

[145] Mr. Benoit Fontaine, a business turnaround specialist with PWC, was called as a witness for the employer. He indicated that TQS had been in need of an operational turnaround before any financial turnaround could occur. He described the net marginal contribution for the different categories of TQS programming. Mr. Fontaine explained, among other things, that the net marginal contribution of news production at TQS for 2006–07 had been negative. He also explained that technical costs for news production had been high because of the technical personnel used. Mr. Fontaine stated that, after analyzing TQS's balance sheet, he had arrived at the general conclusion that the company was not only insolvent but also not financially viable. He added that this finding had presented a huge challenge for a buyer.

[146] In his testimony, Mr. Rémillard indicated that the PWC analysis had revealed that both news production and commercial production were running at a deficit, as was in-house production once the company's administration costs were factored in for this area of operation.

[147] As regards programming for the fall of 2008, Mr. Rémillard indicated that total chaos had reigned because, first of all, most of TQS's suppliers had been creditors and so had no longer wanted to supply their products, and second, TQS had found itself in a position where it could not provide a programming schedule. The sales teams consequently had had nothing to offer and revenues had suffered.

[148] With respect to audience ratings, Mr. Serge Bellerose indicated that, in March 2008, ratings had been declining sharply, which meant low market share and smaller revenues. Mr. Rémillard indicated that there had been an urgent need to act and that an action plan had been needed without delay to save the company.

c–Recovery plan for TQS and events of March, April and May 2008

[149] According to the employer, contrary to what was stated by the applicant unions, there had been no pre-established plan for TQS's future. The plan had evolved as the inevitable findings of various analyses had been pondered.

[150] Mr. Rémillard indicated that, throughout March 2008, TQS management and Remstar management had pondered TQS's future together.

[151] Mr. Serge Bellerose for his part indicated that, around April 12 and 13, 2008 (April 19 and 20, 2008, according to counsel for the employer), there had been one work session that had involved more decision making. Various possibilities had been considered by the Remstar and TQS management team, which had come to a final realization that, if the company was to survive, a drastic change of direction was needed, one that would involve the elimination of news programming. The team at the meeting had opted to turn TQS into an alternative television provider that would not compete with TVA. According to Mr. Bellerose, it was at that meeting that the decision had been made.

i) News

[152] As for news programming, Mr. Bellerose stated the following in his testimony:

> some consideration had to be given to news programming. Everyone agreed that it would not be possible to maintain the existing news broadcast levels... in addition, at Remstar's behest, Pricewaterhouse had carried out a cost-benefit analysis of the news programming and its outside assessment matched the thinking in house, that the news sector had over time fallen into a deficit...
>
> (translation)

[153] Mr. Christian Bernier, who has worked as a comptroller for TQS since September 2008, was called as a witness for the employer. Prior to September 2008, Mr. Bernier worked as Senior Financial Analyst for Cogeco – Radio/Télévision. Mr. Bernier explained that different news programming options had been explored, but that the management team had determined that what

made the most sense was stopping news production altogether. Mr. Bellerose added that the news programs had not been profitable for the very simple reason that audience ratings had dropped over the years. As a result, advertising revenues in the news time slots had dropped, while production costs had remained the same or even risen.

ii) Commercial production

[154] According to Mr. Bellerose, in-house commercial production was also discontinued because it was not profitable. In Mr. Rémillard's view, such operations generated negative revenues and made no net contribution to the undertaking, and it was costly to deliver such services to regional clientele. Mr. Bellerose added that the working group had concluded that, in the end, regional clients could make use of the services of independent production houses and that many fledgling production companies would be happy to seize what they would see as a business opportunity.

iii) In-house program production

[155] Mr. Bellerose stated that some programs produced in house had been less profitable than originally anticipated. He added that using independent production companies was advantageous, provided greater flexibility, allowed for more creative projects developed by independent producers, and provided the freedom to say no to a project. Mr. Rémillard stated that the CRTC broadcasting licences did not require that TQS produce programs in house, nor did they require that TQS produce newscasts. The licensing requirements were broadcasting requirements only. He added that, given the report by PWC, they had quickly realized that the programs produced in-house were a serious financial drain. Since there had been no in-house production obligation, they had considered acquiring products produced by independent undertakings in Quebec and buying the broadcast and other related operating rights.

iv) Option chosen for TQS: operating solely as a broadcaster

[156] According to the employer, the final decisions regarding TQS's future were made toward mid-April 2008. Essentially, TQS's operations would be limited to broadcasting.

[157] In her testimony, Ms. Hélène Bélanger stated the following in this regard:

> And so in the end that was the option chosen. When we left that meeting, we all had our jobs to do. Mine was to make lists of employees, charts, costs, movements and, well, lists of those who would be leaving, those who would be staying and all that that meant—the resulting logistics, shall I say, based on the choice of that option. Anyway, that was around April 20 or 21. I remember that it took us two (2) days to prepare the equivalent of two-hundred and seventy (270) lay-off letters, including all the calculations, as every case was different given the facts specific to each employee. We also had to deal with the non-unionized employees, managers and all, and so we finished the work—all of the documentation required for all those movements—in the evening of the twenty-second (22nd).
>
> (translation)

[158] According to Mr. Bellerose, the result of all of the discussions over the long weekend of work was the adoption, in April 2008, of a business model that involved dropping news programming and replacing it with other types of programming. Mr. Rémillard for his part stated that the reason for choosing this business model had had nothing to do with "decimating" the bargaining units and everything to do with saving the company.

v) Time frame

[159] According to the employer, and contrary to what was alleged by the applicant unions, there had been an urgent need to act given the massive financial losses being faced and the requirements imposed by the CRTC. In the employer's view, it had been a matter of survival.

[160] According to Mr. Rémillard, the CRTC had required that a plan of arrangement be accepted by the creditors before it would hear Remstar's application respecting a change in shareholders, since the CRTC would not make a decision based on a hypothetical situation that might not transpire. He added that any change in control of a broadcaster had to be approved by the CRTC. The CRTC hearing dates had been set for June 2008 and postponing them until September would have jeopardized the entire fall programming since, according to Mr. Rémillard, as a potential buyer, Remstar could not invest in fall programming without knowing whether or not the CRTC would approve the change of control. Mr. Rémillard stated that, without fall programming, there definitely would not have been any business left.

[161] Mr. Bellerose explained the urgent need to act by stating that the plan of arrangement with the creditors had had to be submitted to the comptroller with the Superior Court at the beginning of May, given that the meeting of creditors had been scheduled for May 22, 2008. He explained that they had had to meet with the unions to negotiate adjustments to the collective agreements because the success of the subsequent bargaining had hinged on whether or not severance benefits would be incorporated into the plan of arrangement. Hence the need in Mr. Bellerose's eyes to meet with the unions as quickly as possible, since the plan of arrangement would have to be adjusted accordingly.

[162] The employer thus submits that the CRTC's requirements affected the order in which the various steps had to be taken: 1) begin by deciding on the nature of TQS's recovery plan; 2) work out the plan of arrangement; 3) obtain the approval of the creditors; and 4) appear before the CRTC. The employer contends that the unions' claim that the employer established a false time frame to deliberately pressure them into agreeing to concessions is without merit. According to the employer, business, administrative and regulatory imperatives for the company's survival had dictated the time frame established. The time frame was not a pretext to interfere with the unions' representation of employees.

vi) Lay-offs

[163] According to the employer, the decision to lay off employees flowed from the decisions regarding the restructuring of TQS operations made on or around April 20, 2008, and announced on April 23, 2008.

[164] According to Mr. Rémillard, all employee categories were targeted: management, non-unionized employees and unionized employees. Each department had to streamline its structure to quickly come up with savings to allow it to deal with day-to-day financial obligations. Mr. Rémillard explained that a first set of unconditional lay-offs had been scheduled for the end of June 2008 and a second set, for a later date, subject to the CRTC's decision. He added that TQS had been subject to the CRTC's decision and had had to continue meeting its existing licensing obligations, that is, retain at least the staff needed to produce news programming, pending that decision.

[165] With respect to the possibility of TQS awaiting the CRTC's decision and paying the severance benefits in the ordinary course of business rather than incorporating them into the plan of arrangement with the creditors, Mr. Rémillard stated that TQS had in no way had the capability to pay the severance benefits—its financial circumstances had made that an impossibility.

[166] The employer stresses that, had the CRTC required that TQS maintain the *status quo* as a licensing condition, bankruptcy would have been inevitable. It further submits that all of the lay-offs were the result of the urgent situation the company was facing and not a desire to interfere with union representation. Additionally, it points out that the company succeeded in saving over 200 jobs.

vii) Employee severance benefits and talks with the unions

[167] The employer alleges that TQS was under no obligation to propose any adjustments or the payment of severance benefits through talks with the unions. TQS could have simply incorporated the severance benefits into the debts included in the plan of arrangement without raising the matter with the unions. It submits that it chose to discuss terms in good faith, in a context where the parties were not required to arrive at an agreement. It moreover submits that the terms proposed were proportional to the severity of the crisis at hand. It adds that it had not been ready to meet with the unions before finalizing TQS's business plan. It accordingly invited the unions on April 22, 2008, to a meeting to be held on April 23, to announce the planned lay-offs.

[168] Mr. Bellerose explained that, since the lay-offs had not been negotiable, they had had to be announced to everyone at once, on April 23, 2008. At the time, the employer had given the unions a list of items to be discussed along with a list of employees to be laid off.

[169] Mr. Rémillard explained the context in which a substantial amount of money—$6 million—had been offered to the unions in the period around April 23, 2008, to cover laid-off employees' severance benefits, in return for some adjustments to the collective agreements. He maintained that this sum would have been financed through the savings generated by the adjustments to the

collective agreements. Otherwise, he added, TQS would not have had the means to follow through with such an offer.

[170] Mr. Bellerose further explained that the payment of severance benefits had been conditional on the CRTC's decision and the acceptance of the plan of arrangement by the creditors. He stated that this had been a given, since Remstar's continued involvement had been contingent on those conditions. If the CRTC had refused to approve the transaction, Remstar would have pulled out, and it would not have wanted to pay severance benefits under those circumstances.

[171] According to the employer, the adjustments to the collective agreements sought from the unions could not be conditional on the approval of the CRTC, since TQS had to submit (by May 7, 2008, at the latest) a plan of arrangement in which all debts were set out. It therefore states that, had the CRTC refused to approve the licence amendment application, it would have been too late for TQS to include the severance benefits as claims in the plan of arrangement, since the plan of arrangement would by then have already been voted on by all the creditors and approved by the Court. It submits that TQS did not have the means to take on that financial burden in the ordinary course of business.

[172] With regard to the proposals relating to contracting out, Mr. Rémillard indicated that the employer had asked the unions to allow contracting out to provide the company with greater flexibility.

[173] A second meeting was held on April 24, 2008, at which TQS gave the unions a second list of items for discussion:

> **Summary of adjustments and cost cuts sought – Engineering union**
>
> 18-month moratorium
>
> During this period, we are seeking a suspension of the provisions pertaining to the following:
>
> • Prohibition against having a TQS employee excluded from the bargaining unit perform work normally performed by members of the bargaining unit;
>
> • Use of permanent part-time employees to avoid filling a vacancy for a permanent full-time job;

• Obligation to create a permanent full-time or part-time job when an employee has worked a given number of hours in the same position;

• Requirement for written notice prior to making changes to a work schedule;

• Terms and conditions for staff cutbacks;

• Hours of work;

• Requirement to create jobs.

We are seeking the addition of new provisions in the collective agreement with respect to the following:

• Flexibility and decompartmentalization, that is, ceasing to make job descriptions confer ownership of a given task on a specific employee or bargaining unit;

• Elimination of the clause prohibiting contracting out and establishment of a restructuring and recovery committee in its place;

• Making termination benefits resulting from the major changes introduced during restructuring equal to two weeks' pay per year of service;

• Option for an employee to refuse termination benefits and instead be placed on a recall list; where employees opt for the benefits, the employment relationship with TQS shall be severed;

• We propose new provisions respecting staff cutbacks, that is, the option to use casual employees even if there are permanent employees on the recall list if the said employees are not available or refuse an assignment;

• Standardization of the time frame for movements between employees (two weeks);

• Staff movements (effective on or around June 2, 2008) are to be based above all on experience, knowledge, education, aptitudes and skills;

• A short-term disability plan underwritten by an outside insurer will replace the Employer's existing plan, and banked leave credits will no longer be cashable;

• The Employer will no longer provide leave with pay for employment injuries;

• Time off for union business will be reduced to fifteen (15) days per annum;

• Elimination of terms and conditions for the allocation of overtime;

• Elimination of the different overtime rates and replacement with a clause providing that an employee will be paid at the overtime rate of time and a half as of the 41st hour of work in a week or the 81st hour of work in an 80-hour rotating schedule;

• The Employer and employee will share the costs of benefit plans, including the new short-term disability plan, equally (50%–50%);

• Discontinuance of defined-benefit pension plans;

• Elimination of paid parking privileges;

• Salary and wage freeze for 24 months;

• Discontinuance of *Point Final*;

• Joint application to consolidate certification orders;

• Irrevocable withdrawal of all grievances;

• Prohibition against filing a grievance relating to decisions made as part of the recovery process;

• Non-retroactive effect of any grievance arising out of the agreement on the decisions made as part of the recovery process;

• Option to conclude a private separation agreement;

• Recognition by parties that the restructuring clause is intended to help employees adapt to the major changes being introduced;

• The parties agree that the provisions respecting technological changes set out in the *Canada Labour Code* will not apply for the duration of the term of the collective agreement;

• In consideration of the adjustments to the collective agreement, TQS will treat the following amounts claimed by employees as Unaffected Claims under the plan of arrangement: unpaid vacation time to December 18, 2007; banked sick days to December 18, 2007; banked compensation for overtime (not already taken) to December 18, 2007; and severance benefits;

• The terms of payment of said claims are set out in the agreement;

• The said consideration is conditional on the acceptance of the plan of arrangement by the creditors and full approval by the CRTC;

• Employees opting to collect termination benefits will automatically fully sever their employment relationship with TQS.

(translation)

[174] Ms. Hélène Bélanger, Human Resources Manager, who took part in the meetings with the unions, indicated that the adjustments to the collective agreement sought by the employer would have enabled the company to rebuild over time. However, no agreement could be reached. She explained the situation as follows:

> And so when we returned to the table, we made it clear that we had come to the conclusion that we had perhaps not... we had perhaps actually underestimated the impact of the staff movements of the day before and the fact that it was perhaps more difficult than anticipated for the unions to enter into talks and so, in the end, we were withdrawing all of our proposals. We wished everyone luck and left.
>
> (translation)

Ms. Bélanger explained that the employer had decided to live with the collective agreements and include employee severance benefits in the plan of arrangement.

[175] The employer submits that it had the right to end the negotiations when it did, stick to the collective agreements in effect, and include severance benefits in the plan of arrangement under the CCAA.

[176] On April 26, 2008, after a general meeting at which the unions obtained a mandate to negotiate with the employer, Mr. Côté called Ms. Bélanger to inform her that the unions were prepared to resume discussions with the employer. In the end, another meeting was held with representatives of the employer on April 28, 2008. More bargaining led the employer to present a final offer on May 2, 2008, prior to a union general meeting. In reference to the employer's intent at that time, Mr. Bellerose indicated that the employer had offered the unions adjustments to the clause respecting the payment of benefits. He stated the following:

> So we had called the unions to a meeting late in the afternoon on the Friday, shortly before their general meeting, which was being held that evening, to try to reassure them in this regard and inform them that 1) we were prepared to amend the schedule of payment of the benefits if an agreement could be reached; therefore the benefits would become payable immediately—I think it was fifteen (15) days after approval by the CRTC—instead of in three (3) installments over a period of a year, as initially proposed.
>
> (translation)

[177] Mr. Bellerose indicated that these final offers had been turned down by the unions. He went on to provide the following explanation:

> And so it was as of that point, the next day, that it was decided that since we couldn't arrive at an agreement, we'd keep the clauses—we'd live with the clauses as they were.
>
> (translation)

He added that the unions' refusal of the employer's offers of course meant that the severance benefits had to be included in the plan of arrangement with the creditors under the CCAA.

[178] The employer alleges that the terms and conditions proposed in the talks with the unions starting on April 23, 2008, and the way in which the bargaining was conducted at no time jeopardized the rights of the unions as bargaining agents. It adds that the unions were under no obligation to accept the terms and conditions proposed by TQS outside the collective agreements' renewal parameters.

[179] The employer further alleges that CUPE firmly believed that the CRTC would not authorize the amendments to TQS's licences and that the severance benefits could not be compromised in the plan of arrangement with the creditors. He referred in this regard to the testimony of Mr. Éric Lévesque, who on cross-examination had stated that, in their view, those amounts could not be included in the plan of arrangement with the creditors.

d–Plan of arrangement

[180] The plan of arrangement was filed on May 7, 2008. On May 9, 2008, the comptroller sent it to all the creditors, along with an invitation to a meeting to be held on May 22, 2008. The employer indicates that the plan of arrangement with TQS's creditors contained the same condition respecting the CRTC, that is, that the payment of claims was conditional on a final decision by the CRTC to approve the change in effective control of TQS and the renewal of its licences.

[181] Mr. Rémillard admitted that Remstar had acquired some of the outstanding debts rather than have them included in TQS's plan of arrangement with the other claims. The debts in question involved American distributors, and the intent had been to ensure good relations with those companies in anticipation of the fall programming—in other words, ensure that they would continue to supply it with television products. Mr. Rémillard added that Remstar had bought back those debts at 20 cents on the dollar, the same rate as for all the other creditors, and this action had in no way been intended to trample the voting rights of the employees.

[182] According to the employer, there is no evidence that the plan of arrangement was not a fair and equitable compromise in relation to the claims of the various creditors. The employer accordingly submits that the Board must consider that the choices made, given the excluded claims, were to the net advantage of all employees, whether or not they were unionized, and that the employees' rights were recognized. As for the employees' other claims covered by the plan of arrangement, including those relating to pay equity and severance benefits, the employer argues that the employees were treated fairly and all had to bear the consequences of the compromise inevitably represented by the plan of arrangement.

[183] The employer therefore argues that it is not the Board's role to review the plan of arrangement or consider its inclusions and exclusions, since such issues were addressed and decided in civil court. According to the employer, there is nothing unfair or inequitable about the way in which the plan of arrangement was produced.

e–Talks in the regions

[184] According to the employer, Mr. Michel Cloutier was not acting on the instructions of TQS or even Remstar when he approached TQS employees. The employer maintains that members of the union executive were always involved in any talks with unionized employees in the regions.

[185] According to Ms. Bélanger, Mr. Cloutier had never received any instructions from the employer to make offers to certain employees in the regions or to enter into negotiations of any kind that were different from those held in April 2008.

i) Case of Mr. Serge St-Arnaud

[186] According to Mr. Cloutier, Mr. St-Arnaud was the one who had gone to see him and asked for his help. In speaking about Mr. St-Arnaud in his testimony, Mr. Cloutier stated the following: "For reasons that strike me as very clear, he no longer had a job and I was fully aware that, at his age, it might not be easy for him to get back into our field" (translation). He added that he had told him the following: " Look, Serge, I'm gonna help you; I'm gonna help you, because he didn't think that what I was doing to help Benoit and Pierre and Éric Girouard was fair when compared with what I was doing for him, and I wanted to help him and so I got involved; I got caught up in it. There was no other reason" (translation).

[187] Mr. Cloutier added that Mr. St-Arnaud had approached him, saying that he needed to change his car, since the lease on his was ending in August 2008. Mr. Cloutier had then explained to Mr. St-Arnaud that he was not authorized to have such a discussion but that he wanted to help him. Mr. Cloutier indicated that Mr. St-Arnaud had constantly harassed him with all kinds of talk and

requests. He added that there had been no obligation toward Mr. St-Arnaud or any other employee whatsoever. In his own way, he had wanted to help him. Finally, Mr. Cloutier admitted that he had reached an agreement with Mr. St-Arnaud. He had signed the document personally, in his capacity as general manager.

[188] According to Mr. Rémillard, Mr. Cloutier had never been given instructions of any kind with respect to the agreement reached with Mr. St-Arnaud.

[189] The employer submits that Mr. St-Arnaud had been president of the Syndicat des réalisateurs de TQS Mauricie in Trois-Rivières at the time in question, and that the evidence shows that Mr. Cloutier had been acting alone when he had taken the initiative to help Mr. St-Arnaud by signing an agreement that the employer termed strictly personal and for his sole benefit.

f–Consolidation of positions

[190] According to the employer, whether the issue was the consolidation of the positions of editor and producer or the reorganization of promotional material routing work in the regions, TQS always held talks with the union representatives concerned.

[191] According to the oral evidence given by Ms. Hélène Bélanger, TQS had held various discussions with the representatives of the CSN-affiliated unions, Mr. Sylvain Côté, Ms. Guylaine Roy and Ms. Louise Joly, regarding the consolidation of positions or the creation of a new producer-designer position. As for the position of producer-editor offered to Mr. Patrick Handfield, Ms. Bélanger added that, on April 9, 2009, a written agreement regarding the self-promotion producer and post-production editor positions had finally been signed by TQS, the Syndicat des employé-e-s de l'ingénierie de TQS Inc. (FNC-CSN) and the Syndicat des réalisatrices et réalisateurs en auto-publicité de TQS Inc. (FNC-CSN).

[192] In regard to the reorganization of the promotional material routing work in the regions, Ms. Bélanger submitted that the position of sales assistant had quite simply been eliminated and a

non-unionized position of in-house representative had been created. According to Ms. Bélanger, this meant that an agreement could be entered into without the union's involvement.

g–Start-up of independent production companies in the regions

[193] According to the employer, neither TQS nor Remstar was involved in the start-up of the companies in the regions. Mr. Serge Bellerose stated that, to his knowledge, TQS had not had any role in establishing the companies as such. In his testimony, he stated the following:

> The role played was that, once they made it known that they planned to go into business, they wanted to discuss the purchase of equipment that, when it came down to it, was no longer of any use to TQS. And so, at that point, some business was conducted among those people.
>
> (translation)

[194] Mr. Maxime Rémillard for his part stated that the management board had not given anyone any instructions to encourage or sponsor the establishment of local companies using former employees of TQS.

i) Speed Média

[195] According to the employer, neither TQS nor Remstar played any role whatsoever in the establishment of Speed Média in Québec. Mr. Renaud Francoeur stated that there had been a business opportunity and that TQS had not been involved in any way in starting up Speed Média. Mr. Francoeur indicated that about 50% of the company's business flows directly or indirectly from his business relationship with TQS. The other 50% is from production work billed directly to clients, for broadcasting on TQS, TVA or the CBC French network. Mr. Francoeur added that, after he had left TQS and TQS or Remstar had decided to discontinue commercial production work, there had been an opportunity to go after that clientele, given that he had known what TQS's sales numbers had been and how many clients TQS had served year after year.

ii) Point Bleu Productions

[196] Mr. Pierre Lauzer stated that it had been following a meeting with a regional director of sales for the CBC that they (Pierre Lauzer and Benoît Laflamme) had decided to start up the company. The director of sales had told them that she was looking for someone to produce advertising to be sold by the CBC. The CBC wanted to ensure that it had someone to do production work in the regions.

iii) Agence de nouvelles ADN5 Inc.

[197] Mr. Sylvain Girard, who heads ADN5 along with Mr. Richard Desmarais, testified that what had triggered the start-up of the company had been the CRTC's decision respecting the licence renewals, which required TQS to produce a minimum amount of news programming. It was then that he had decided to submit a proposal to TQS. He added that TQS had never asked them to produce news programming. He and, later, his associate, Richard Desmarais, had been the ones to decide to do so. He stated the following:

> I wondered what I could do to save my job. At that point, the CRTC's decision meant that TQS was required to produce news programming. So I decided to seize the opportunity, telling myself that I would start my own business and produce news programming. If it didn't work out, if TQS was not interested, well, at least I would know I had tried, and then I'd do something else.
>
> (translation)

As for Mr. Desmarais, the idea of starting up the agency had come to him in the spring of 2008, when he had seen the complications faced by TQS at the time. He had contacted TQS and then Mr. Girard when he had learned that he too had made a proposal to produce weekend news programming.

iv) Projet momentum

[198] In regard to Projet momentum, the employer argued that the testimony of Mr. Denis Gervais showed that no TQS representative had ever urged him or recommended to him that he go into the commercial production business. The employer further noted that Mr. Gervais had confirmed that

he had already had a small company, Gervais TV, which he had started in 2007, well before the events of April 2008.

h–Connection with clients of production houses

[199] The employer submits that Michel Cloutier's testimony confirmed that TQS and the production houses had not entered into any agreement for the production houses to produce advertising for all the clients referred by TQS. The employer further submits that the admissions of Point Bleu Productions, Projet momentum and Zed Productions on the record as well as the testimony by Mr. Renaud Francoeur for Speed Média showed that the clients of TQS are under no obligation to do business with any one of those companies.

i–Sale of TQS equipment

[200] The employer submits that the sale of TQS equipment used for in-house production was inevitable. It also points out that Michel Cloutier's initiative respecting the sale of equipment in Mauricie was blocked.

[201] In his testimony, Mr. Michel Cloutier admitted to having attempted to facilitate the procurement of TQS equipment that was necessary and indispensable for the start-up of production companies in the regions, particularly Trois-Rivières. However, when he had discussed the matter with Mr. Tony Porrello, the latter had told him not to get involved, that the price of the TQS equipment would be set on the basis of a valuation by TQS's technical manager.

[202] Mr. Francoeur of Speed Média stated that TQS had not been involved in financing the procurement of equipment for their company. Mr. Richard Desmarais of ADN5 stated that the procurement of equipment had been financed through a numbered company that he owns and that is in no way related to ADN5.

j–Communication with employees and unions' representational capacity

[203] Finally, the employer argues at length that communications with employees (including some press releases) were in no way intended to undermine confidence in the unions' capacity to play their role as bargaining agents.

[204] The employer moreover draws attention to the many court proceedings instituted by the applicant unions to challenge decisions respecting the plan of arrangement, as well as the many grievances filed, indicating that they clearly show that the employer in no way undermined the unions' representational capacity in this matter.

B–The Parties' Legal Arguments

1–CSN-Affiliated Unions

a–Importance of good faith bargaining

[205] In support of their evidence, the unions begin by recalling the foundations of effective labour-management relations set out in the preamble to the *Code*, that is, freedom of association and free collective bargaining. They submit that collective bargaining is the cornerstone of labour relations, citing the decision of the Supreme Court of Canada in *Health Services and Support - Facilities Subsector Bargaining Assn.* v. *British Columbia*, 2007 SCC 27; [2007] 2 S.C.R. 391, and pointing out that, in that decision, the Court confirmed that the concept of freedom of association set out in section 2(*d*) of the *Canadian Charter of Rights and Freedoms* (the *Charter*) includes the notion of a procedural right to collective bargaining. The unions submit that since that decision of the Supreme Court of Canada constitutionalizing the procedural right to collective bargaining, the principles of good faith bargaining have applied at all times, even in the absence of a notice to bargain pursuant to section 50*(a)* of the *Code*, as in the instant case.

[206] That said, the unions recall the general principles of good faith bargaining, in particular the principles set forth by the Supreme Court of Canada in *Royal Oak Mines Inc.* v. *Canada (Labour*

Relations Board), [1996] 1 S.C.R. 369, respecting the application of section 50(*a*) of the *Code*, that is, the duty to enter into bargaining in good faith and to make every reasonable effort to enter into a collective agreement. The unions submit that the two conditions are not cumulative, however, in that a party can appear to want to bargain in good faith, yet make no reasonable effort to enter into a collective agreement.

[207] The unions refer to the principles related to section 50(*a*) of the *Code* set forth by the Board and its predecessor, the Canada Labour Relations Board (the CLRB), in particular in *Crawford Transport Inc.*, 2006 CIRB 370; *Nav Canada*, 1999 CIRB 13; *Atomic Energy of Canada Limited*, 2001 CIRB 110; *National Bank of Canada*, 2000 CIRB 101; *Brewster Transport Company Limited* (1986), 66 di 1; 13 CLRBR (NS) 339; and 86 CLLC 16,040 (CLRB no. 574); *British Columbia Telephone Company* (1977), 22 di 507; [1977] 2 Can LRBR 404; and 77 CLLC 16,108 (CLRB no. 99); and *Voyageur Inc.* (1989), 77 di 14; and 90 CLLC 16,021 (CLRB no. 732). They submit that the intent of section 50(*a*) of the *Code* is to allow for an equitable balance of power at the bargaining table and that the Board promotes conduct on the part of the parties that optimizes rational discussion and effective and constructive communication required to reach an agreement.

[208] The unions submit that case law has also established that isolated actions at the bargaining table, when taken together, can constitute bad faith, drawing a parallel with the events that took place during the bargaining phase from April 24, 2008, to May 2, 2008, and referring in passing to the following allegations made by the unions in support of their complaint:

- the employer may not achieve its economic bargaining objectives on its own away from the bargaining table after becoming intransigent at the bargaining table;

- the employer must allow the other party sufficient time to respond; doing otherwise can amount to bad faith;

- the employer may not attempt to enter into negotiations for a collective agreement in respect of a smaller group within the bargaining unit;

- the employer may not impose completely unfair or unreasonable conditions that are contrary to section 50(*a*) of the *Code*;

- the duty to bargain in good faith does not end because the union has rejected an offer made by the employer;

- the fact of making offers that the employer knows will be unacceptable to the union can amount to bad faith bargaining.

[209] The unions submit that the fact that TQS was placed under the protection of the CCAA during the bargaining phase did not vitiate the application and respect of rights and obligations under the *Code*. They point out that the CCAA does not take precedence over the *Code* and that both statutes apply concurrently.

b–Intent of section 94(1)(*a*) of the *Code* and anti-union animus

[210] The unions submit that it is not necessary to find anti-union animus in order to determine a violation of section 94(1)(*a*) of the *Code*. They refer to the principles established by the Board and the CLRB in a number of decisions, including *Canadian Broadcasting Corporation* (1990), 83 di 102; and 91 CLLC 16,007 (CLRB no. 839); *Verspeeten Cartage Ltd.*, 2004 CIRB 270; *D.H.L. International Express Limited*, 2001 CIRB 129; *Bell Canada*, 2003 CIRB 212; *Crawford Transport Inc.*, *supra*; *Télévision Saint-François* Inc. (1981), 43 di 175 (CLRB no. 306); *Aliant Telecom Inc.*, 2005 CIRB 310; *Atomic Energy of Canada Limited*, 2005 CIRB 334; and *TELUS Communications Inc.*, 2005 CIRB 317.

[211] The unions stress that, based on the principles established in Board decisions relating to the application of section 94(1) of the *Code*, employers are prohibited from interfering with the unions, and the duty to bargain in good faith is directly related to the duty to refrain from engaging in unfair labour practices under section 94(1)(*a*) of the *Code*. The unions moreover refer to the well-established principle that, given the unions' exclusive representation function, the presence of unions erects a screen between the employer and the employees, and the employer is accordingly prohibited

from negotiating working conditions directly with employees. They refer in this regard to the decision of the CLRB in *Télévision Saint-François Inc.*, *supra*. The unions add that, as stated in *Brewster Transport Company Limited*, *supra*, certain employer communications with employees can be illegal under section 94(1)*(a)* of the *Code*. The unions refer to an excerpt from *TELUS Communications Inc.*, *supra,* which consistently holds that although section 94(1)(*a*) of the *Code* does not prohibit all communications between employers and employees, its intent is to protect employees and unions from communications that could undermine the unions' role as the exclusive bargaining agents for the employees, as provided for under section 36(1)(*a*) of the *Code*.

[212] Referring again to the events surrounding the bargaining phase that got underway on April 24, 2008, and the manner in which the employer called the unions and employees to meetings during that phase, the unions submit that holding captive audience meetings as was done in the instant case is, in their view, a violation of section 94(1)(*a*) [formerly section 184(1)(*a*) of the *Code*] or section 94(3)(*a*) of the *Code*, in reference to a decision of the CLRB in *Bank of Montreal (Bank and Cecil Streets Branch, Ottawa)* (1985), 61 di 83; and 10 CLRBR (NS) 129 (CLRB no. 518).

[213] The CSN-affiliated unions were given the opportunity to reply orally to the employer's response. They addressed the employer's arguments primarily by pointing out that the employer had a duty of good faith in bargaining with the unions. They moreover submitted that the Board's assessment of the employer's conduct should not be tempered because of the application of the CCAA.

[214] In conclusion, the CSN-affiliated unions ask that the Board allow their complaint and

> DECLARE that TQS Inc. and Remstar Corporation engaged in unfair labour practices, specifically in that they failed to engage in a bargaining process that would not undermine the freedom of association of the bargaining agents, by bargaining in bad faith in that
>
> i. the deadlines set were clearly inadequate given the list of matters to be negotiated and the financial difficulties alleged by the employer;
>
> ii. illegal conditions were set, particularly in regard to the repudiation of the right to grieve and to technological changes;
>
> iii. the employer made proposals that it had to know would be turned down by the bargaining agents given the magnitude of what was being sought, particularly in regard to the clauses of the collective agreements respecting contracting out;

iv. the employer made its consideration for the concessions conditional on the decision of a third party.

DECLARE that TQS Inc. and Remstar Corporation engaged in unfair labour practices, specifically in that they sought to enter into specific agreements with employees, whether laid off or not, to have them waive contracting-out clauses and the unions' right to file a grievance in return for receiving their full severance benefits, in any form;

DECLARE that TQS Inc. and Remstar Corporation engaged in unfair labour practices, specifically in that they sought to contact and negotiate directly with union members;

DECLARE that TQS Inc. and Remstar Corporation engaged in unfair labour practices, specifically in that they terminated or laid off employees when shifting the work to a third party allowed them to continue their operations;

RESERVE jurisdiction to order appropriate remedies;

ORDER anything deemed appropriate.

(translation)

2–CUPE

[215] CUPE submitted detailed arguments in support of the complaint in the instant matter, which the Board read and listened to carefully. Insofar as they largely present the same facts and position set forth by the CSN-affiliated unions, the Board will not detail all of the submissions here. The Board nonetheless notes that CUPE's primary allegation is that the employer violated section 94(1) of the *Code* through a series of behaviours that, when added together, show a clear intention to no longer do business with it. It argues that such intent amounts to anti-union animus. CUPE further submits that the employer's actions, when taken together, constitute a clear violation of the freedom of association of the members of the bargaining unit it represents and a violation of section 94(1) of the *Code*.

[216] The union is of the view that the actions set out below, which it listed in its written submissions, constitute unfair labour practices on the part of the employer:

(1) Bad Faith Bargaining

- an unreasonable time frame that was set unilaterally, which made it impossible for the union to provide proper representation;

- refusal by the employer to entertain a counter-proposal within the very time frame set by it;

- illegal, discriminatory or unreasonable stipulations by the employer;

- uncertain consideration, conditional on the decision of a third party, in return for immediate concessions.

(2) Direct Communication With Employees

- communication strategy aimed at destabilizing and discrediting the unions;
- communications containing incomplete or inaccurate and therefore misleading content;
- direct communication with employees during bargaining at the same time that it refused to meet with the union;
- threatening communications to fuel employee concerns;
- communications that prompted employees to act against exclusive union representation;

(3) Business decisions that decimated the bargaining unit, made without first informing or consulting the union, and refusal to discuss those decisions at the bargaining table;

(4) Unilateral changes to working conditions provided for in the collective agreement and unilateral offer to pay certain sums that were subject to negotiation, in violation of exclusive union representation;

(5) Clear chronic violations of the collective agreement with a view to permanently clearing the recall list and decimating the bargaining unit;

(6) Refusal to engage in sound labour relations with CUPE for a period of two years.

[217] In its reply to the employer's arguments, CUPE points out among other things that a process under the CCAA requires good faith bargaining with the bargaining agent. It states that this is particularly important in relation to CUPE, which saw its bargaining unit decimated by 95% with the shutdown of the newsroom in Québec even though a collective agreement had been entered into for the unit it represents less than six months prior to the lay-off announcement. CUPE submits that arriving at that collective agreement had required major concessions on its part in relation to work organization, to allow the company to save money in a context where TQS was to implement a restructuring plan involving more in-house production.

[218] In connection with the process established under the CCAA, CUPE alleges that the employer unilaterally made offers directly to employees, through the plan of arrangement, that were more generous that what they were entitled to under the CCAA and applicable case law, without negotiating with the unions. With regard to the plan of arrangement, CUPE alleges that the employer unilaterally amended the terms of lay-off set out in the collective agreements without negotiating with the unions. CUPE moreover submits that the employer did not recognize CUPE's role as exclusive representative in the claim process or the process to have the plan of arrangement approved and, additionally, that the employer encouraged employees to revoke their proxy and vote individually contrary to the mandates given to the bargaining agents at their general meeting.

[219] Further, CUPE emphasizes the duty of good faith in collective bargaining relationships between the employer and the bargaining agents. In its view, such duty is a continuing duty and not one limited to the periods set out in section 50(*a*) of the *Code*. It also emphasizes the importance of the decision of the Supreme Court of Canada in *Health Services and Support - Facilities Subsector Bargaining Assn.* v. *British Columbia*, *supra*, which in its view affirmed the Board's earlier case law establishing that the right to collective bargaining is intrinsically linked with freedom of association. CUPE adds that the connection between the duty to bargain in good faith and the duty to recognize the exclusive representation role of the union has long been recognized and was confirmed by the Supreme Court of Canada in *Canadian Union of Public Employees* v. *Labour Relations Board (N.S.) et al.*, [1983] 2 S.C.R. 311.

[220] CUPE also had the opportunity to make submissions regarding the decision of the Supreme Court of Canada handed down on April 29, 2011, in *Ontario (Attorney General)* v. *Fraser*, 2011 SCC 20, subsequent to the parties' oral arguments. CUPE pointed out among other things that that decision confirmed that freedom of association requires that the employer bargain with an association in good faith. In its view, this means that, under section 94(1) of the *Code*, sanctions may be imposed in respect of conduct on the part of the employer toward the bargaining agent that does not meet the requirements of good faith bargaining, regardless of when it occurs.

[221] CUPE entered into evidence a number of decisions by different administrative tribunals and common law courts as well as the Supreme Court of Canada in support of the evidence and its arguments. It also submitted a scholarly article by Michel Coutu, Laurence-Léa Fontaine and Georges Marceau that discusses the decision of the Supreme Court of Canada in *Health Services and Support - Facilities Subsector Bargaining Assn.* v. *British Columbia*, *supra*: M. Coutu et al., *L'arrêt Health Services and Support de la Cour suprême du Canada : La constitutionnalisation du régime québécois des relations industrielles?*, Vol. 13, No. 2 (Montréal, Lex Electronica, 2008).

[222] CUPE accordingly asks that the Board find that the employer violated section 94(1) of the *Code*. It also asks that the Board remain seized of the instant matter to order appropriate remedies.

3–Employer

[223] The employer set out several of its legal positions in its submissions in relation to the evidence. The following is a summary of the main points made in its submissions regarding the main legal arguments put forth. The employer submits that the acts alleged against it in connection with the complaint of unfair labour practice filed by the applicant unions were not a violation of freedom of association, bad faith bargaining or a violation of exclusive union representation.

[224] The employer adds that it did not interfere in the representation of the unionized employees by the unions, undermine the credibility of the unions, or hinder the unions' capacity to represent their respective members. It alleges that there is no evidence of anti-union animus on its part. On the contrary, it submits that the evidence shows that the applicant unions energetically represented their

members, unfettered by anything other than the company's financial circumstances.

[225] The employer submits that it made decisions in relation to restructuring the company in a context of technical bankruptcy and a very difficult climate for the industry. It adds that those decisions were not a pretext to interfere in employee representation by the unions. It further submits that the decisions that were made were justified by their context and were aimed at ensuring the long-term survival of the company while saving a number of jobs.

[226] The employer alleges that this is the first time that the Board has had to entertain a complaint of unfair labour practice in the context of the application of the CCAA and the exceptional nature of that legislation. It argues that the Board must appreciate the context of urgency faced by the company as well as the many interests it had to reconcile, in a delicate balancing act, to ensure its survival. The employer filed, among other things, a decision of the British Columbia Court of Appeal, in *Chef Ready Foods Ltd.* v. *Hongkong Bank of Canada*, 51 BCLR (2d) 84 (B.C.C.A.), to explain the foundations of the CCAA, its social and economic role, and the fact that, if a debtor company is unable to reach agreement with its creditors and arrive at a compromise after petitioning for protection under the CCAA, bankruptcy results. The employer also refers to numerous decisions handed down in regard to the CCAA to support its position that it is not unusual for severance benefits owing to employees to be included in the plan of arrangement with creditors. It explains that the collective agreement does not create a super-priority claim for the employees covered. It submits that the unions' argument that the employee claims related to severance benefits under the collective agreement should have been subject to negotiation is not supported by any authority. The employer submits that it had a legitimate right under the CCAA to interfere with the enforcement of such claims under the collective agreement.

[227] With respect to the application of section 94(1) of the *Code*, the employer argues that the burden is on the unions to show on a balance of probabilities that the employer engaged in unfair labour practices. It submits that its actions in the instant matter in no way indicate anti-union animus. It filed a number of decisions in support of its arguments.

[228] More specifically in regard to the employer's communication with employees, the employer argues that such communication did not cause any loss of confidence on the part of the employees in the capacity of the unions to play their role as bargaining agents. It alleges that TQS was going through a period of crisis and insecurity and that management had decided to ensure that everyone concerned was kept informed, to put an end to any rumours and reassure suppliers and clients if necessary. It refers in this respect to a number of decisions, including the decision in *Air Canada*, 2001 CIRB 131, to argue that communication between an employer and its employees can occur without it meaning that the employer is interfering with union representation of the employees. It adds that the Board must among other things consider the labour relations context in assessing the employer's communications, their content and their consequences. It submits that an analysis of such elements in this matter does not lead to a conclusion that the employer used such communications to "participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union" within the meaning of section 94(1) of the *Code*.

[229] With respect to the use of the services of production houses, the employer argues that Arbitrator Provençal already issued an arbitral award in regard to the grievances against contracting out and that award shows TQS's clear right to discontinue its in-house production operations. The employer repeats that it made the decision in this respect on the basis of legitimate financial considerations and not because it wanted to decimate the bargaining units.

[230] In response to the unions' argument respecting *Health Services and Support - Facilities Subsector Bargaining Assn.* v. *British Columbia*, *supra*, the employer alleges that section 50 of the *Code* already provides for freedom of association and the right to collective bargaining. It submits that, outside this process, there is no need for the Board to interpret section 94(1) of the *Code* liberally, weaving all the notions found in section 50 into it.

[231] In a surreply to CUPE's reply, the employer argues among other things that the applicant unions are asking the Board to break new ground in the application of the *Code*, going well beyond the principles already established in its case law and that of the Supreme Court with respect to the interpretation of section 2(*d*) of the *Charter*. It submits that the decision in *Health Services and*

Support - Facilities Subsector Bargaining Assn. v. *British Columbia*, *supra*, did not establish the principle that employers have a continuing duty to bargain in good faith.

[232] The employer moreover refers to the decision of the Supreme Court in *Ontario (Attorney General)* v. *Fraser*, *supra*, which was handed down subsequent to oral arguments and concerning which the other parties had the opportunity to make submissions. It stresses that, in that matter, the majority of the Court indicated that *Health Services and Support - Facilities Subsector Bargaining Assn.* v. *British Columbia*, *supra*, did not impose any constitutional obligations on private-sector employers but rather did so on governments as employers and on Parliament and the legislative assemblies as lawmakers.

[233] The employer further submits that federal lawmakers have already made provision for a mechanism to give full impetus to section 2(*d*) of the *Charter* respecting freedom of association within the framework of section 50 of the *Code*, but that the *Code* does not provide for a continuing duty to bargain in good faith. The employer submits that, in any event, the unions did not challenge the constitutionality of the provisions of the *Code* and, to do so, they would have had to implicate the government. It contends that the unions are instead attempting to unduly extend the Supreme Court's reasoning in *Health Services and Support - Facilities Subsector Bargaining Assn.* v. *British Columbia*, *supra*, to encompass section 94 of the *Code*. It also argues that if it were established that there is a continuing duty to bargain in good faith and that a breach of that duty by the employer could carry sanctions under section 94 of the *Code*, an imbalance would result, since there is no equivalent recourse for employers in respect of unions.

[234] The employer reiterates its position in response to CUPE's comments in regard to the decision in *Ontario (Attorney General)* v. *Fraser*, *supra*, insisting on the fact that, in its view, the *Code* already meets the constitutional requirements and objectives of the *Charter*.

[235] The employer moreover reiterates its position regarding the application of the CCAA and submits that the applicant unions are confusing "contractual obligation" (translation) under the collective agreement with "performance" (translation) of that obligation under the CCAA. It further submits that the CCAA requires that the debtor company personally seek a compromise with its

creditors or the parties to which the creditors give power of attorney, if applicable, and not with the bargaining agents, since the claims are of a personal nature and not union claims.

[236] For all of these reasons, the employer submits that its actions do not constitute unfair labour practice and asks that the Board dismiss the complaint filed by the applicant unions.

4–Interested Parties

[237] On January 6, 2009, the Board granted interested party status to various production houses and authorized those interested parties to make submissions once the main parties had completed their arguments. On March 29, 2011, counsel Nicolas Leclerc informed the Board that he would be representing Point Bleu Productions, Projet momentum, ADN5 and Speed Média, then proceeded to summarize their position with regard to the evidence adduced.

[238] Counsel submits that the companies in question are owned by former unionized employees of TQS who, after being laid off, took control of their own destiny and decided they would do everything in their power to continue to do what they loved best. He submits that, with very little in the way of means or resources, those former employees started up their own production houses to produce visual material, commercial work, corporate videos and television programs. He submits that they admitted to being very happy that they had been able to count on TQS as one of their clients.

[239] Counsel submits that, contrary to what is alleged by the unions, the oral evidence shows that the interested parties he represents started their regional production companies on their own because they had a desire to create their own jobs, their own livelihood, without any interference or pressure from TQS. Admitting that the start-up of the regional companies was concurrent with TQS's decision to cease in-house commercial production, counsel argues that TQS never attempted to persuade the founders of the regional undertakings to set up their own production companies. He submits that there were never any consultations or dealings with TQS with a view to setting up bogus companies to meet TQS's own needs. Counsel adds that, with the exception of Speed Média, the production houses never had any contracts with TQS with respect to the referral of clients, and he

points out that TQS never had any kind of control over their production and never interfered with the business relationships between the production houses and their commercial clients.

[240] According to counsel, the oral evidence of Messrs. Gervais and Lauzer shows that TQS never interfered with the contracts entered into by the clients and production houses to set price structures, billing methods or means of production. Counsel adds that the evidence also shows that commercial clients have always been free to do business with whatever production house they choose for the design and production of advertising. He moreover submits that the evidence has shown that TQS never interfered with the selection of the employees hired by the production houses. Counsel refers to the oral evidence given by Mr. Gervais in response to a question regarding the hiring of former TQS employees. He submits that Mr. Gervais responded that either he or his associate had decided to hire former TQS employees given that they were former co-workers who had lost their jobs as they had and so it was logical to think of them first.

[241] With regard to the equipment used or purchased by the production houses, counsel submits that the evidence shows that TQS never imposed anything on them in this regard. He submits that Messrs. Pierre Lauzer (Point Bleu Productions), Denis Gervais (Projet momentum) and Renaud Francoeur (Speed Média) were all clear in their testimony in this regard. He adds that TQS did not help the companies to pay for the equipment they purchased either, arguing the TQS never provided them with any financing. Counsel further submits that there is no evidence of overbilling being used as a means of payment of the severance benefits of former TQS employees. Counsel cites an excerpt from the oral evidence given by Mr. Sylvain Girard, of ADN5, who stated the following:

> TQS never, ever, asked us to start a newscast. I want to be very clear: first of all, it never, ever, came up. This was something that I and, later, my associate Richard Desmarais, thought up.... We decided to start the company. I was facing the same dilemma as everyone else. I was going through a really difficult time. I had just lost... I had just learned that I would be losing my job and I asked myself what I could do to continue working in news, which is what I loved doing above all else.
>
> (translation)

[242] Counsel also refers to the testimony of Mr. Pierre Lauzer, of Point Bleu Productions, who, along with his associate Benoît Laflamme, was very hesitant to start up a business, and finally decided to start Point Bleu Productions after meeting with the regional director of sales for the CBC

French network and learning that the network was looking for a company in Mauricie to produce advertising. Counsel submits that, without a verbal understanding with the CBC, Mr. Lauzer would certainly have been hesitant about making such large expenditures to start his own company. Counsel submits that Point Bleu Productions is a completely autonomous and financially independent company and that it is not supported by TQS, as is shown by Mr. Lauzer's testimony.

[243] With regard to Speed Média, counsel submits that the testimony of Mr. Renaud Francoeur shows that, in the days following his lay-off, he decided to contact Ms. Nathalie Fleury, former production manager, who had also been laid off, to suggest that they start a production company, learning at that same time that TQS was closing the newsroom and discontinuing commercial production. Counsel cited Mr. Francoeur's oral evidence, in which he stated the following:

> And so I decided that, since I wasn't ready to retire and what I knew best was the Quebec market, the advertising market—those were my roots, after all—commercial production as well; getting together to do what TQS was no longer doing, that is, commercial production for local clients ... it was a good business opportunity. Since one production house had closed, the time to open one to take its place was now or never.
>
> (translation)

[244] As regards the hiring of former TQS employees, Mr. Francoeur stated that the former employees had been available, competent, reliable and experienced. Counsel further submits that Mr. Francoeur's oral evidence shows that Speed Média was targeting not only the advertising niche, but also the development of the corporate video sector and the Internet, and its operations were not limited to productions for the TQS television network.

[245] With regard to Projet momentum, counsel indicates that Mr. Gervais, a former TQS employee with 21 years of experience, had already started up a commercial production company by the name of Gervais Point TV and, when he had learned of his termination, he had decided to expand his company and offer services as an independent producer to both TQS and the CBC. Counsel submits that Mr. Gervais knew the production community and so saw an opportunity to offer his services as a producer by joining forces with Mr. Paul Lefrançois, also a former employee of TQS. According to counsel, Mr. Gervais was categorical in responding to the question as to whether TQS had urged him to start a commercial production company; his answer was a very clear "never." Counsel

submits that the evidence shows that Mr. Gervais and his associate procured a new editing room for $15,000 and succeeded in getting a camera from a friend for a good price.

[246] Counsel submits that what is being alleged by the applicant unions is the opposite of what actually occurred in regard to the various heads of the production houses. He adds that, contrary to what is being alleged by the applicant unions, the production houses are not TQS creations; they were not started up by TQS management, or for the benefit of TQS, or to allow TQS to interfere with union representation or decimate the bargaining units.

C–Analysis and Decision

1–Relevant Statutory Provisions

[247] The following are the relevant provisions of the *Code* in this matter:

> **Preamble**
>
> **WHEREAS** there is a long tradition in Canada of labour legislation and policy designed for the promotion of the common well-being through the encouragement of free collective bargaining and the constructive settlement of disputes;
>
> **AND WHEREAS** Canadian workers, trade unions and employers recognize and support freedom of association and free collective bargaining as the bases of effective industrial relations for the determination of good working conditions and sound labour-management relations;
>
> **AND WHEREAS** the Government of Canada has ratified Convention No. 87 of the International Labour Organization concerning Freedom of Association and Protection of the Right to Organize and has assumed international reporting responsibilities in this regard;
>
> **AND WHEREAS** the Parliament of Canada desires to continue and extend its support to labour and management in their cooperative efforts to develop good relations and constructive collective bargaining practices, and deems the development of good industrial relations to be in the best interests of Canada in ensuring a just share of the fruits of progress to all;
>
> ...
>
> 8.(1) Every employee is free to join the trade union of their choice and to participate in its lawful activities.
>
> ...
>
> 36.(1) Where a trade union is certified as the bargaining agent for a bargaining unit,

(*a*) the trade union so certified has exclusive authority to bargain collectively on behalf of the employees in the bargaining unit;

...

50. Where notice to bargain collectively has been given under this Part,

(*a*) the bargaining agent and the employer, without delay, but in any case within twenty days after the notice was given unless the parties otherwise agree, shall

(i) meet and commence, or cause authorized representatives on their behalf to meet and commence, to bargain collectively in good faith, and

(ii) make every reasonable effort to enter into a collective agreement; and

...

94.(1) No employer or person acting on behalf of an employer shall

(*a*) participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union; or

(*b*) contribute financial or other support to a trade union.

(2) An employer is deemed not to contravene subsection (1) by reason only that they

...

(*c*) express a personal point of view, so long as the employer does not use coercion, intimidation, threats, promises or undue influence.

(3) No employer or person acting on behalf of an employer shall

(*a*) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person

> (i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of a trade union or participates in the promotion, formation or administration of a trade union,
>
> ....

(*b*) impose any condition in a contract of employment that restrains, or has the effect of restraining, an employee from exercising any right conferred on him by this Part;

...

(*e*) seek, by intimidation, threat of dismissal or any other kind of threat, by the imposition of a financial or other penalty or by any other means, to compel a person to refrain from becoming or to cease to be a member, officer or representative of a trade union ...

...

98.(4) Where a complaint is made in writing pursuant to section 97 in respect of an alleged failure by an employer or any person acting on behalf of an employer to comply with subsection 94(3), the

written complaint is itself evidence that such failure actually occurred and, if any party to the complaint proceedings alleges that such failure did not occur, the burden of proof thereof is on that party.

99.(1) Where ... the Board determines that a party to a complaint has contravened or failed to comply with ... section 94 ... the Board may, by order, require the party to comply with or cease contravening that subsection or section and may

...

(*c*) in respect of a failure to comply with paragraph 94(3)(*a*), (*c*) or (*f*), by order, require an employer to

(i) employ, continue to employ or permit to return to the duties of their employment any employee or other person whom the employer or any person acting on behalf of the employer has refused to employ or continue to employ, has suspended, transferred, laid off or otherwise discriminated against, or discharged for a reason that is prohibited by one of those paragraphs,

(ii) pay to any employee or other person affected by that failure compensation not exceeding such sum as, in the opinion of the Board, is equivalent to the remuneration that would, but for that failure, have been paid by the employer to that employee or other person, and

...

(*d*) in respect of a failure to comply with paragraph 94(3)(*e*), by order, require an employer to rescind any action taken in respect of and pay compensation to any employee affected by the failure, not exceeding such sum as, in the opinion of the Board, is equivalent to any financial or other penalty imposed on the employee by the employer;

...

(2) For the purpose of ensuring the fulfilment of the objectives of this Part, the Board may, in respect of any contravention of or failure to comply with any provision to which subsection (1) applies and in addition to or in lieu of any other order that the Board is authorized to make under that subsection, by order, require an employer or a trade union to do or refrain from doing any thing that it is equitable to require the employer or trade union to do or refrain from doing in order to remedy or counteract any consequence of the contravention or failure to comply that is adverse to the fulfilment of those objectives.

[248] The relevant provisions of the *Canadian Charter of Rights and Freedoms* read as follows:

2. Everyone has the following fundamental freedoms:

(*d*) freedom of association.

...

32.(1) This Charter applies

(*a*) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(*b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

2–Scope of Section 94(1) of the *Code*

[249] The essence of the unions' complaint relates to section 94(1) of the *Code*, which among other things provides that no employer may interfere with the representation of employees by a union. Section 94(1) of the *Code* has been interpreted and applied by the Board in a number of its decisions. The applicant unions cited several of the Board's decisions, including those in *D.H.L. International Express Limited*, *supra*, and *Verspeeten Cartage Ltd.*, *supra*. In the latter, the Board outlined the relevant case law, reiterating the principles set out in *D.H.L. International Express Limited*, *supra*, respecting the protection afforded by section 94(1) of the *Code*. In *D.H.L. International Express Limited*, *supra* (regarding which an application for reconsideration was dismissed by the Board in *D.H.L. International Express Limited*, 2002 CIRB 159), the Board described the scope of section 94(1) of the *Code* at length before stating the following:

> **Employer Interference in Union**
>
> [100] Subsection 94(1) prohibits the employer from interfering in union matters. It protects the fundamental right of association (section 8) as well as the union's role in representing employees in the bargaining unit. In *Aéroports de Montréal* (1995), 97 di 116 (CLRB no. 1115), the Board commented that this section "prohibits an employer from interfering in any way or undermining the union's exclusive right to bargain".
>
> [101] The Board's review of the jurisprudence in *Canada Post Corporation* (1985), 63 di 136 (CLRB no. 544) revealed that the protection afforded by paragraph 94(1)(*a*) takes a number of forms:
>
> " ... This protection in fact mirrors the many constantly changing forms that the right to join a union may take, this right constituting... one of the "basic freedoms." [Section 94(1)(*a*)] prohibits both deliberate and unintentional violation of this right. The protection it affords is aimed at both actions that seek to undermine the status of the bargaining agent and those that merely have this effect. It also extends to those actions that compromise the integrity of the bargaining unit which the union represents. Finally, this protection continues to apply both in the absence and in the presence of a collective agreement. This explains what we referred to earlier as the "omnibus" nature of the protection of [section 94(1)(*a*)]. ..."
>
> (page 160)
>
> [102] There is little doubt the purpose of subsection 94(1) is also to encourage free collective bargaining and the settlement of disputes. In other words, an employer's duty to bargain in good faith is directly related to its duty not to carry out unfair practices under paragraph 94(1)(*a*). The Supreme Court of Canada confirmed this point in *Canadian Broadcasting Corp.* v. *Canada (Labour Relations Board)*, [1995] 1 S.C.R. 157. McLachlin J., while dissenting from the majority in the result, appropriately set out the relationship of paragraph 94(1)(*a*) to the Preamble of the *Code*:
>
> " ... The purpose of s. 94(1)(*a*) may be inferred from the preamble to Part I of the *Code*, in which it is found... It is to encourage "free collective bargaining and the constructive settlement of disputes";

> to support "freedom of association and free collective bargaining as the bases of effective industrial relations for the determination of good working conditions and sound labour-management relations"; to aid in the development of "good relations and constructive collective bargaining practices".
>
> If the purpose of Part I of the *Code* is to promote and preserve the collective bargaining system, the purpose of the s. 94(1) protection in particular is to preserve the integrity of the collective bargaining system by avoiding situations in which employees might be deterred from speaking frankly on collective bargaining matters for fear of discipline or changes to their jobs. Section 94(1) confers an extraordinary protection, in the sense that it may override the usual rights and policies of the employer.
> ...
>
> (pages 213–214)"
>
> (*D.H.L. International Express Limited*, RD 129)

[250] In that same decision, the Board noted that although anti-union animus is not a necessary ingredient for a determination of a violation by an employer of section 94(1) of the *Code*, in some circumstances, the presence of anti-union animus can transform otherwise permissible actions into violations of section 94(1)(*a*) of the *Code*:

> **Anti-union Animus**
>
> [109] Although it is not necessary to find anti-union animus in order to determine a violation of paragraph 94(1)(*a*), the Board has, in previous decisions, recognized that the presence of anti-union animus can transform otherwise permissible actions into violations of paragraph 94(1)(*a*) of the *Code* (see *Wardair Canada (1975) Ltd.* (1983), 53 di 26; and 2 CLRBR (NS) 129 (CLRB no. 409); and *Canada Post Corporation* (1987), 68 di 226; and 15 CLRBR (NS) 289 (CLRB no. 613)). In *National Bank of Canada* (1981), 42 di 352; and [1982] 3 Can LRBR 1 (CLRB no. 355) the Board made the following general comments regarding subsection 94(1):
>
> "...
>
> On several occasions, the Board has had the opportunity to distinguish between the separate offences listed in [sections 94(1)(*a*) and 94(3)(*a*)]. In this connection, it was held that [section 94(1)(*a*)] encompassed matters specified in [section 94(3)]... Specifically, [section 94(1)(*a*)] protects, generally speaking, employees and their union against any interference in the "representation" of employees by the union, and this protection begins as soon as the employees decide to join a union...
>
> (pages 369–370; and 15–16)"

[251] As the Board also noted in *Verspeeten Cartage Ltd.*, *supra*, case law respecting the application of section 94(1)(*a*) of the *Code* tells us that, even if there is no anti-union animus, if the employer undertakes major reorganization that has a significant deleterious impact on the bargaining units, section 94(1)(*a*) imposes upon the employer an obligation of candour and a requirement that the impact of the organizational issues in question be meaningfully explored with the union. This issue

was addressed in *Canadian National Railway Company* (1994), 95 di 78; and 94 CLLC 16,061 (CLRB no. 1081), in which the Board stated the following:

> In providing insufficient notice of a transaction which so obviously raises difficult labour relations issues and significantly affects employment terms and conditions for a large number of bargaining unit employees, CNRC effectively side-stepped the statutory role of the unions that hold the exclusive right of representation. The unions were denied an opportunity and the ability to explore in a rational, ordered manner any number of questions concerning employee status and rights and their own right of representation, questions that inevitably arise from a decision of such dramatic consequences given CNRC's position on the matter...
>
> That CNRC should deny the unions this opportunity amounts in these circumstances, in our view, to undermining the union's statutory authority and obligation to represent employees. The *Code* does not specify every obligation or right of employers, employees and their bargaining agents. Section 94(1)(*a*) is worded in a general, purposive manner, and the Board must apply this general wording to the endless variety of circumstances that may arise.
>
> (pages 84–85; and 14,505–14,506)

3–*Health Services and Support - Facilities Subsector Bargaining Assn.* v. *British Columbia* and *Ontario (Attorney General)* v. *Fraser*

[252] The unions cited the decision of the Supreme Court of Canada in *Health Services and Support - Facilities Subsector Bargaining Assn.* v. *British Columbia*, *supra*, submitting that, in that decision, the Court had confirmed that the concept of freedom of association provided for in section 2(*d*) of the *Charter* includes the notion of a procedural right to collective bargaining and that the principles relating to good faith bargaining are applicable at all times, even in the absence of a notice to bargain pursuant to section 50(*a*) of the *Code*, as is the case in the instant matter. Further, they submitted that the decision in *Ontario (Attorney General)* v. *Fraser*, *supra*, cited by the employer, confirmed that freedom of association requires good faith on the part of the employer in bargaining with an association.

[253] The Board deems it important to point out here that the decision in *Health Services and Support - Facilities Subsector Bargaining Assn.* v. *British Columbia*, *supra,* pertained to legislative action sought by a provincial government as a public employer rather than action by a private employer. Section 32 of the *Charter* in fact states the following:

> 32.(1) This Charter applies

> (*a*) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
>
> (*b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

[254] As was clearly explained by the majority of the Supreme Court of Canada in *Ontario (Attorney General)* v. *Fraser*, *supra*, the decision in *Health Services and Support - Facilities Subsector Bargaining Assn.* v. *British Columbia*, *supra*, did not impose duties under the *Charter* **on private employers**, but on governments as employers and on lawmakers, since they are the ones that are subject to the provisions of the *Charter*:

> [73] It may also be observed that *Health Services* does not impose constitutional duties on private employers, but on governments as employers and parliaments and legislatures as law makers, in accordance with s. 32 of the *Charter*. Rather, the majority held that individuals have a right against the state to a process of collective bargaining in good faith, and that this right requires the state to impose statutory obligations on employers. As held by Cory and Iacobucci JJ. in *Vriend* v. *Alberta*, [1998] 1 S.C.R. 493, one must "distinguish between 'private activity' and 'laws that regulate private activity'. The former is not subject to the *Charter*, while the latter obviously is" (para. 66). If workers are incapable of exercising their right to collective bargaining, they may only bring a *Charter* claim against the government and not their employer, and they must show a state action.

[255] In the Board's view, the decision in *Health Services and Support - Facilities Subsector Bargaining Assn.* v. *British Columbia*, *supra*, did not raise any doubts as to the *Code*'s compliance with the *Charter*.

[256] Indeed, it is important to remember that the issue in that matter was the constitutionality of provincial legislation that the Government of British Columbia wanted to use in its capacity as employer to substantially amend rights pertaining to the working conditions of health-sector employees by essentially preventing collective bargaining on a number of issues. In its analysis, the Supreme Court of Canada determined that the freedom of association guaranteed under section 2(*d*) of the *Charter* included a procedural right to collective bargaining. However, the majority of the Court indicated that freedom of association does not protect all aspects of associational activity connected with collective bargaining but rather protects only against "substantial interference" with such activity.

[257] In regard to the parties' duty to bargain in good faith, the majority of the Supreme Court indicated that the parties have a duty to engage in meaningful dialogue and to make a reasonable

effort to arrive at an acceptable contract. However, the Court pointed out that the duty to bargain in good faith does not impose on the parties an obligation to conclude a collective agreement, nor does it include a duty to accept any particular contractual provisions. The Court goes on to draw a parallel in this regard with the existing structure under the *Code* and labour legislation from all provinces:

> 99. Consistent with this, the *Canada Labour Code* and legislation from all provinces impose on employers and unions the right and duty to bargain in good faith (see generally Adams, at pp. 10-91 and 10-92). The duty to bargain in good faith under labour codes is essentially procedural and does not dictate the content of any particular agreement achieved through collective bargaining. ...
>
> (*Health Services and Support - Facilities Subsector Bargaining Assn.* v. *British Columbia*, *supra*)

[258] The Court then went on to apply those principles to the facts of the case and found that several provisions of the provincial legislation in question amounted to substantial interference with the right to engage in collective bargaining because they dealt with matters of major importance to the employees affected and failed to safeguard the basic processes of collective bargaining. In addition, some provisions of the British Columbia legislation were found to be unconstitutional.

[259] Although the Supreme Court's recognition of a procedural right to collective bargaining under section 2(*d*) of the *Charter* may have caused some legal upheaval in some industries at the time the decision was handed down, it did not create any doubts respecting the stability of the system in place for so long under the *Code*. In fact, the provisions of the *Code* pertaining to collective bargaining already contained all the required elements to ensure full recognition of the procedural right to collective bargaining as recognized under section 2(*d*) of the *Charter*. Furthermore, in the instant matter, none of the parties challenged the constitutionality of any provision of the *Code* whatsoever.

[260] The Board accordingly cannot accept the unions' argument that the principles set forth in *Health Services and Support - Facilities Subsector Bargaining Assn.* v. *British Columbia* and *Ontario (Attorney General)* v. *Fraser*, *supra*, amended the scope of the duty of the bargaining agent and employer to bargain in good faith provided for in the current provisions of the *Code*. Those provisions already guarantee a procedural right to collective bargaining and already allow real freedom of association as protected by the *Charter*. Thus, a private employer's duty to bargain in

good faith pursuant to the *Code* remains intact and unchanged by the principles set forth in the two Supreme Court of Canada decisions in question.

[261] That said, beyond any considerations related to constitutional law, good faith on the part of the parties is something that the Board must often address in the matters it considers. When the Board has before it an unfair labour practice complaint pursuant to section 94(1) of the *Code*, as in the instant matter, it must objectively assess whether an employer participated in or interfered with the formation or administration of a trade union or the representation of employees by a trade union within the meaning of that section of the *Code*. However, lack of good faith on the part on an employer can be one of the factors leading the Board to find that the employer's actions were intended to undermine the union's representational capacity and thereby violated section 94(1) of the *Code*. Such conduct could in such instances be viewed as anti-union animus. Each case must be dealt with on the basis of the specific facts at play and the evidence on the record.

4–Analysis of the Merits of the Complaint

[262] The unions allege that the employer violated sections 94(1) and 94(3) of the *Code* through a series of actions, taken both in isolation and as a whole. Their arguments may be summarized under six main headings: (a) lack of good faith on the part of the employer in announcing the lay-offs and in bargaining in April and May 2008; (b) direct communications with the employees; (c) undermining of the representative character of the unions through the plan of arrangement with the creditors; (d) undermining of the representative character of the unions through its attempt to enter into specific agreements with employees in the regions with a view to having them waive the contracting-out clauses in the collective agreement; (e) use of regional production houses for commercial production and news production following the major lay-offs; and (f) the consolidation of positions.

a–Lack of good faith on the part of the employer in announcing the lay-offs and in bargaining in April and May 2008

[263] The changes made by the employer in April 2008 had serious consequences for the employees and the unions and, in the Board's view, were without a doubt significant organizational and

structural changes. Consequently, this panel carefully considered the facts set forth with regard to the bargaining phase that took place in April and May 2008.

[264] The unions allege that they were denied a real "bargaining process" and submit that the employer failed to bargain in good faith in that it did not engage in a meaningful dialogue. They add that the employer failed to make a reasonable effort to arrive at an agreement that was acceptable to the unions.

[265] The employer for its part asks that, in weighing the evidence, the Board consider the urgent context faced by the company during this period and the many interests it had to reconcile, in a delicate balancing act, to ensure its survival. The employer is thus asking the Board to take into account the exceptional nature of the circumstances in which it found itself, that is, under the protection of the CCAA.

[266] The evidence shows that the unions learned about the magnitude of the lay-offs announced on April 23, 2008, at the same time as the employees and that the first bargaining meeting with the employer was held the next day, on April 24. The evidence also shows that the unions were given little if any latitude in approaching their respective members about a bargaining mandate and were told that any agreement would have to be reached by April 28, 2008, at the latest. In her testimony, Ms. Hélène Bélanger explained that the employer had had to act quickly to meet the deadline for the plan of arrangement with the creditors. When the employer realized that negotiations could not take place as it hoped before April 28, 2008, it called an end to the bargaining and wished the unions luck. On April 25, 2008, it issued a press release in this regard, indicating that it had been prepared to pay 100% of employee claims, but that the unions' demands and procedural timetable had been inconsistent with its objective of reaching an agreement by Monday, April 28, 2008. Consequently, it announced that no request to reopen or make adjustments to the nine collective agreements could be discussed and it would not be making any proposals. This effectively put an end to the negotiations regarding adjustments to the collective agreements. The employer accordingly would remain bound by the collective agreements and would include employee severance benefits in the plan of arrangement with the other claims.

[267] The unions nonetheless sought and obtained a bargaining mandate from their members at a union general meeting held on April 26, 2008. They therefore called the employer back, to inform it that they were open to negotiation. They had obtained a broad mandate to take part in any negotiation aimed at implementing a true process to reorganize the company and the work with a view to turning the company and the news and production services around. The employer agreed to resume negotiations on Monday, April 28, 2008. Although negotiations did resume on that date, the evidence shows that the employer produced a proposal that involved huge concessions on the part of the unions, including the suspension of several clauses of the collective agreements respecting union jurisdiction for a period of 18 months, in return for a commitment by the employer to pay laid-off employees' severance benefits, among other things, subject to certain conditions. The unions considered the proposal unacceptable given that the payments were conditional on acceptance of the plan of arrangement by the creditors and its approval by the Court and, especially, conditional on full approval by the CRTC of the requests for changes to the obligation that it produce and broadcast news programming.

[268] Counter-proposals were made by both sides on April 29, 2008. Among other things, the unions proposed that the entire agreement, including their own concessions, be conditional on acceptance of the plan of arrangement with the creditors and the CRTC's full approval of TQS's requests. On May 1, the union attempted to have a new counter-proposal approved; however, the employer did not respond. Instead, the employer issued a press release that same day in which it laid out its latest offers and asked the unions to inform their members of them.

[269] A last meeting was held on May 2 at the request of the employer, which wanted to try to clarify its latest offers. The offers were rejected by the employees at a union general meeting on the evening of May 2, 2008. This brought negotiations with the unions to a definite end.

[270] The fact that the employer made the payment of severance benefits conditional on the CRTC's approval of its requests and approval of the plan of arrangement with the creditors seems understandable in some respects, given that the employer did not want to put all that money on the table without it yielding any results. The payments would have been made by Remstar and it wanted to be sure of a return at the end of the process. Had the CRTC denied the request for a change of

control to Remstar and the renewal of TQS's licences, or had the plan of arrangement not been accepted by the creditors and approved by the Superior Court, then Remstar would have dropped out of the process. It therefore had no intention of paying out $6 million in advance to the employees of a company with which it would no longer have any association.

[271] Although the adjustments sought by the employer appear extreme, the employer explained that it could have chosen not to ask the unions for any adjustments and to simply add the value of the severance benefits directly to the claims in the plan of arrangement. In any event, it is not the role of the Board to determine the legal status of such claims. One thing is certain, however: once claims are added to a plan of arrangement, their value drops by a significant percentage, in order to reduce the amount to be paid by the company placed under the protection of the CCAA.

[272] Mr. Maxime Rémillard explained in this regard that the employer had offered the unions full payment of severance benefits to employees, representing a sum of $6 million, in exchange for adjustments to the collective agreements. He explained that the money would have come from the savings made as a result of the adjustments, since the company would not otherwise have had the means to make such payments. It may therefore be concluded that the employer offered the unions a bargaining avenue but the unions apparently considered such avenue impracticable.

[273] The Board also understands that the employer did not want the adjustments to the collective agreements sought from the unions to also be conditional on the CRTC's approval of TQS's requests, since the employer wanted to submit a plan of arrangement with creditors by May 7, 2008, and all claims (including any payment of employee claims, such as severance benefits) had to be known. However, the CRTC could not make a decision regarding the TQS's licences before June 2008.

[274] On the other hand, it is just as understandable that the unions did not want to give up their jurisdiction and agree to the considerable demands of the employer in return for something that was conditional on third-party agreement to elements over which the unions had no control. Considering the short time frames and emotionally charged atmosphere in which all of these negotiations took place, it is not surprising that they failed.

[275] In the Board's view, the April 23, 2008, lay-off announcement was the result of a real business decision made following careful consideration by TQS of the company's financial circumstances and the different parts of its operations, in the context of the serious financial difficulties described previously. Based on the oral evidence heard, including that of TQS's in-house comptroller and of the accounting expert consulted by the company, the Board is unable to conclude that TQS's decision to discontinue its production operations in April 2008 was made with a view to decimating the bargaining units and damaging the representational capacity of the unions. Though difficult and painful for all the employees affected, the decision was motivated by extreme financial straights rather than a desire to target a union.

[276] TQS's decision also meant that laid-off employees held claims against a company under the protection of the CCAA, which was required to quickly prepare a plan of arrangement with its creditors. Negotiations were attempted by the employer regarding the possibility to exclude some of the claims, that is, the severance benefits, from the plan of arrangement. This would have allowed the employees affected to recover the entire amount owed to them, but would have required considerable concessions on the part of the unions. In the Board's view, the parties' respective positions were irreconcilable. It is true that the conduct of the employer during this period of negotiation could be deemed troubling, were it not for the exceptional circumstances in which it found itself. TQS was operating in survival mode and, as shown by the evidence, Remstar could have withdrawn its purchase offer if, in the end, the plan of arrangement with the creditors was not accepted or if the CRTC refused to approve the application for change of control or the renewal of TQS's licences.

[277] Once the payment of the severance benefits totalling some $6 million became conditional on the acceptance of conditions out of the control of the unions, it was unlikely that an agreement could ever be reached with them. Given this context and the exceptional circumstances involved and in light of established case law, the Board is unable to find that the conduct of the employer during the bargaining phase as such violated the provisions of section 94(1) of the *Code*. Further, the Board is unable to agree with the allegation that, during this period, the employer's strategy demonstrated

anti-union animus or bad faith that would lead the Board to find that the employer violated section 94(1) of the *Code*.

b–Direct communications with the employees

[278] In their submissions regarding the period of intense bargaining with the employer in April and May 2008, the unions argued that the employer had used press releases to disclose the content of its offers to the general public. They submitted that the employer had then attempted to persuade employees individually of the fairness of its proposals, thereby discrediting the bargaining agents in the eyes of the employees they represented.

[279] The employer issued a first press release on April 25, 2008, the day after a bargaining meeting with the unions, and a second press release on May 1, 2008, the day before the general meeting at which employees were to vote on the latest employer offers.

[280] The press release of April 25, 2008, reads as follows:

> **TQS Would Have Paid 100% of Employee Claims**
>
> MONTRÉAL, April 25 / CNW Telbec / – TQS has reaffirmed that at the meeting of April 24 it did in fact propose to pay 100% of employee claims provided that the talks led to a satisfactory agreement. These are the facts:
>
> 1. On Thursday, April 10, Mr. Tony Porrello, Acting Manager, along with Ms. Hélène Bélanger, Senior Human Resources Manager, informed the union representatives of the nine bargaining units at TQS of the items covered in the collective agreements concerning which TQS was seeking adjustments.
>
> 2. The agenda for the meeting that was given to the unions contained the following points: "involvement of unions in the search for solutions" and "bargaining process to get under way quickly."
>
> 3. On April 19, a union general meeting that had been duly called was cancelled.
>
> 4. Union representatives were also called to meetings scheduled for April 24 and 25 to discuss these matters.
>
> 5. The union representatives sought and obtained time off with pay pursuant to the provisions of the collective agreements respecting collective bargaining for April 24 and 25.
>
> 6. On April 23, the union representatives were again advised of the matters for discussion, in greater detail.

7. On April 24, TQS representatives met with union representatives for the express purpose of discussing the monetary and non-monetary adjustments deemed necessary. They were prepared to negotiate.

8. It is a fact that, right from the outset of the talks, TQS offered to pay 100% of employee claims on the express condition that the talks lead to satisfactory agreements.

9. TQS explained that the agreements, whatever their number, had to be entered into by Monday, April 28, at the latest because of the deadlines set by the Superior Court.

10. TQS even explained that it was not absolutely necessary to obtain nine agreements.

11. TQS also allowed all the union representatives to ask any questions they had and share what they were thinking.

12. The unions essentially responded as follows:

(a) They had several requests for information and for access to documents relating to, among other things, the restructuring process supervised by the Superior Court.
(b) They had no mandates to bargain from their members.
(c) They demanded that the employer provide detailed proposals before they sought such mandates.
(d) They explained that a general meeting on the evening of Thursday, the 24th, or Friday, the 25th, was not possible—that only a meeting already called for Saturday, April 26, would be held.
(e) It was not possible to meet with TQS as early as Sunday morning.
(f) Talks therefore could not get underway until Monday, April 28, at the earliest.
(g) Finally, the unions stood united and there would either be nine agreements or none.

13. After some consideration, TQS replied as follows:

(a) TQS recognized and respected the unions' procedural prerequisites and timetable.
(b) TQS noted that such prerequisites and timetable were incompatible with the aim of attempting to enter into agreements by Monday, April 28.

Under the circumstances, TQS explained that no request to reopen or make adjustments to the nine collective agreements could be brought to the table and, consequently, TQS would not be making a proposal.

(translation)

[281] The press release issued by the employer on May 1, 2008, the day before the union meeting at which employees were to vote on the latest employer offers, read as follows:

TQS Calls on Unions to Cooperate

MONTRÉAL, May 1 /CNW Telbec/ – "We have for a week now been trying to involve the unions in the turnaround of the company. TQS management has come up with proposals on several points, which include saving some jobs from the cuts recently announced. Once again, we ask the unions to inform their members about these offers," has stated Serge Bellerose, Vice-President of Corporate Affairs and currently CEO of TQS.

TQS posted a loss of $18 million over the past year and has an accumulated deficit of $71 million. It has been technically bankrupt since December 18, 2007, and is losing about $1.4 million a month.

Given those circumstances, management has no choice but to review its business model and promptly bring its operating budget into line with its expected revenues.

TQS management is very much aware of the importance of maintaining regional programming to provide an accurate reflection of life in the regions. However, the news service lost $7 million in 2007 and the anticipated cumulative annual losses over the next seven years, the duration of the licence sought from the CRTC, are in excess of $50 million. It is paramount that a different way be found to reflect regional realities. Below is an outline of what TQS is proposing to its unionized employees:

- TQS wants to introduce an innovative formula to reflect life in the different communities it serves and ensure that its programming meets the expectations of its viewing audience. Thirty-four additional unionized jobs will be saved in Québec, Montréal and the other regions served to ensure news production according to a redefined model adapted to market conditions.

- TQS is prepared to pay 100% of all its unionized employees' claims for sick days, accumulated overtime and severance benefits if an agreement can be reached with the unions and all steps for introducing the recovery plan are successful.

- TQS is reversing the salary freeze and proposing a new short-term disability plan under which contributions are shared equally by the employer and employees.

- TQS is prepared to offer up to one year of salary in severance benefits to any permanent employees laid off in the future because of the major changes, including any technological changes or contracting-out requirements that arise during implementation of the recovery plan.

- TQS is proposing termination of the defined benefit pension plan, which has an accumulated deficit of $2 million, and its replacement with a defined contribution pension plan for all employees.

- TQS is proposing that a joint labour-management restructuring and recovery committee be set up to receive and discuss union proposals for alternatives to management's business directions, with a view to improving the recovery plan.

Despite the financial concessions sought from management and employees, TQS does not expect a return to profitability for at least three years, yet the company will have to invest considerable sums to modernize its equipment and convert its network to digital and high definition (HD) by 2011.

The news service will be maintained until the CRTC issues its decision and will not be replaced by a different formula until next September.

"The reality of the time frames for the settlement process with the creditors and the application before the CRTC, as well as the need to deal with highly complex issues at each step leaves little time. It would be to the benefit of both TQS management and the unions to promptly arrive at an agreement and work together to turn the company around," concluded Mr. Bellerose.

To absorb the losses associated with maintaining a traditional news service, TQS has asked its unions to explore the labour-sponsored funds, a solution that would make it possible to eliminate the $7 million annual deficit.

TQS understands that the unions still see the adjustments and cost cuts sought as significant, but it nonetheless hopes that, given the difficult circumstances being faced by the company, they will present TQS's proposals to the employees in order that they may all have a say, with a view to contributing to the recovery of the company.

(translation)

[282] The issue is whether the employer interfered in the unions' representation of the employees by communicating with the employees at the time and in the manner it did about important matters that had been the subject of intensive bargaining between itself and the unions, such as the payment of employee severance benefits and certain clauses of the collective agreement.

[283] The Board has on many occasions commented on the significance and extent of the prohibition under section 94(1) of the *Code* relating to direct communication with employees. In *Saskatchewan Wheat Pool* (1996), 101 di 127 (CLRB no. 1167), the Board emphasized three factors that are considered in determining whether an employer has crossed the thin dividing line between what is proper direct communication under the *Code* and what is not: the labour relations context within which such communications take place, the content of the communications themselves, and the consequences, intended or not, that they have on the authority of the bargaining agent.

[284] The factors that the Board must consider in determining whether or not the employer violated section 94(1) of the *Code* were also reviewed in a more recent Board decision, *Air Canada*, 2001 CIRB 131. That matter concerned a complaint of unfair labour practice filed by the union pursuant to section 97(1) of the *Code*, in which it was alleged that Air Canada had interfered with union administration and the representation of union members through improper communication with employees, in violation of section 94(1)(*a*) of the *Code*. The employer, wishing to negotiate long-term collective agreements with each of the different unions representing its employees, along with other concessions, had offered a one-time bonus to the members of each union that signed such agreements. Air Canada had then communicated with the employees in regard to the bonus, among other things.

[285] The Board found that, given the context of an operative collective agreement and the relatively moderate tone and innocuousness of the content of the communications, among other things, Air Canada had not crossed the line set by the established limits. Looking at the three factors set out in *Saskatchewan Wheat Pool*, *supra*, the Board stated the following:

> [16] It is clear from the Board's decision in *Saskatchewan Wheat Pool*, *supra*, however, that the test is not a tiered test, whereby each element must be satisfied; in that case, the Board held that the accuracy of the content did not diminish the negative effect that would result from the communication.

> Instead, the three elements are to be considered together to determine whether the impugned communication crosses the line from acceptable contact to interference. ...
>
> (*Air Canada*, *supra*)

[286] With regard to the third factor, the consequences of the communication, the Board had this to say:

> [28] Because the effect of employer communication is, by nature, a matter of fact for the Board to decide, there is little jurisprudence to indicate when interference has been established. It is for the Board to decide whether the communication has actually undermined the union's ability to represent or undermined the membership's faith in the union.
>
> (*Air Canada*, *supra*)

[287] Relying on a decision of the CLRB in *Canadian Pacific Air Lines Limited* (1985), 61 di 140; and 10 CLRBR (NS) 62 (CLRB no. 520), the Board also pointed out, in *Air Canada*, *supra*, that employer communications can contravene the *Code* without there being interference. The Board further indicated that there is no need to prove that the employer intended to interfere in the union's administration to prove the merits of a complaint of interference.

[288] In the instant matter, the Board must consider the content of the communications by the employer and the particular labour relations context of such communications, as well as their consequences.

[289] The fact that, in its press release of April 25, 2008, the employer stated that, on April 24, 2008, it had been prepared to discuss and negotiate monetary and non-monetary adjustments in return for which it would pay 100% of employee claims shows how badly it wanted to address employees directly rather than go through the unions, which had first wanted to obtain a mandate to bargain from their members. Given these circumstances, it is difficult to imagine that the purpose of the direct communication with employees on April 25, 2008, even before the unions had had a chance to talk to their members on April 26, 2008, could be anything other than to undermine the role of the representatives of the certified bargaining agents.

[290] The same is true of the press release issued on May 1, 2008, titled "TQS Calls on Unions to Cooperate." That press release was issued by the employer the day after the meeting with the unions

at which the unions had indicated that the employer's latest offer was unacceptable. In that press release, the employer provided an outline of its proposals of the day before and repeated that it had been prepared to pay 100% of employee claims, including severance benefits, provided an agreement could be reached with the unions and the various steps for introducing the recovery plan were successful.

[291] How can the fact that the employer addressed employees directly on May 1, 2008, be reconciled with the fact that, according to the evidence, the union prepared a counter-proposal on May 1, 2008, which the employer never considered? In the Board's view, the employer's decision to use a press release to broadcast the details of the proposals it had made to the unions the day before shows its intention to interfere in the unions' representation of their members and ultimately influence TQS employees, knowing that the employees would be voting on its proposals at the union meeting the next day.

[292] Having to react quickly to that press release, the unions issued that very same day an information bulletin to the employees they represented, to restate the facts according to their own perspective prior to the vote on the employer offers on May 2, 2008.

[293] In the view of the Board, both press releases issued by the employer went far beyond merely expressing the employer's viewpoint concerning the status of negotiations. They were intended to directly address the employees, many of whom had quick access to press releases because of their jobs in the newsrooms, undermining the representational capacity of the unions.

[294] Although the Board does not believe that the press releases in question actually changed the way employees voted on the employer's offers on May 2, 2008, since the offers were soundly rejected by the employees, the fact remains that this was clearly the aim of the communication process used by the employer.

[295] In the Board's view, this conduct toward the unions on the part of the employer was in violation of the *Code* and, while the circumstances relating to TQS's precarious position were special, they did not excuse the employer's conduct.

[296] For the foregoing reasons, the Board finds that the employer violated section 94(1)(*a*) of the *Code* when it issued the press releases on April 25 and May 1, 2008, to explain the proposals it had made to the unions.

[297] This finding respecting the two press releases issued by the employer in no way vitiates the Board's findings concerning the overall bargaining period in April and May 2008 discussed in the previous section of this decision.

c–Undermining of the representative character of the unions through the plan of arrangement with the creditors

[298] In its arguments, CUPE contends that the employer would have unilaterally decided which claims would be paid in the ordinary course of business and which would not. It contends that the employer would accordingly have chosen to treat vacation time, overtime, sick days, statutory holidays and deferred leave as Unaffected Claims under the plan of arrangement, without including pay equity claims.

[299] CUPE submits that the employer's unilateral decision regarding the treatment of employee rights under the collective agreement was a violation of exclusive union representation and, thus, was unfair labour practice. CUPE alleges that, had negotiations in good faith taken place in this regard, the unions could have given priority to the payment of the severance benefits and pay equity claims within the framework of the plan of arrangement rather than the other benefits. According to CUPE, the employer then did everything in its power to ensure that the unionized employees would not be able to influence the majority of the creditors voting on the plan of arrangement at the creditors' meeting. This, in CUPE's view, explains why the employer wanted to pay some employees' claims (vacation time, overtime, sick leave, statutory holidays and deferred leave) in full, to reduce the number of employees who could vote on the plan of arrangement and thus ensure that the majority of creditors would vote to accept the plan.

[300] The Board does not concur. The plan of arrangement was accepted by the comptoller appointed by the Superior Court and his approval rested with the creditors concerned. CUPE and

a number of employees attempted to have the plan of arrangement modified within the framework of a motion filed in Superior Court on May 13, 2008, with a view to, among other things, have severance benefits and pay equity claims excluded from the debts included in the plan of arrangement and also have the creditors' meeting postponed until after the CRTC had issued its decision respecting TQS's licences. They also filed another motion in Superior Court on May 20, 2008, seeking to present the creditors with a plan of arrangement other than the one produced by Remstar. The CSN unions also filed a motion in Superior Court, on May 9, 2008, seeking among other things to have the creditors' meeting and approval of the plan of arrangement postponed until after the CRTC had issued its decision on the TQS's licences.

[301] All of those motions were denied by the Superior Court on May 16, 2008. Further, CUPE's application for leave to appeal to the Quebec Court of Appeal was dismissed, on August 1, 2008. The Court of Appeal's decision also dealt with CUPE's application for leave to appeal the decision of the Superior Court of June 4, 2008, to dispense with its objections and ratify the plan of arrangement accepted by the creditors. The Court of Appeal stated the following in its decision respecting CUPE's two applications for leave to appeal:

> [24] It is true that, when a company seeks the protection of the CCAA, it cannot escape the conditions imposed by the collective agreement that bind it to its personnel. In the past, an attempt was made to dodge the collectively negotiated working conditions by dismissing the employees and rehiring them at conditions set unilaterally by the judicial administrator. In *Syndicat national de l'amiante d'Asbestos inc.* v. *Mine Jeffrey inc.*, 2003 Can LII 47918 (QCCA), our Court concluded that the compensation payable to the employees kept on in their positions or called back after the initial order had to be that set out in the collective agreement.
>
> [25] That does not mean, however, that the employee claims predating the initial order must be paid in full. Those claims do not escape the painful compromise inevitably involved in the Plan of Arrangement. Employees who have become creditors are not entitled to priority or secured status.
>
> [26] The rights of the employees are defined by the collective agreement governing them and by certain legislative provisions. Resulting claims may be uncertain, however, as are those of the other creditors, in this case, suppliers whose livelihood is also threatened by the financial precariousness of their debtor.
>
> [27] The contentions of counsel for the petitioners are based on the erroneous premise that the employees are entitled to a privileged status. That is not what the CCAA provides nor what our Court decided in *Syndicat national de l'amiante d'Asbestos inc.* v. *Mine Jeffrey inc., supra* ...
>
> ...
>
> [29] In summary, I am of the opinion that the appeals the petitioners wish to institute are not driven by the interest of all the parties, or even by that of all the creditors, that the issues of the treatment of

> employees' rights and recovery of their claims are no longer the subject of a jurisprudential debate, and that the appeal will have the effect of needlessly delaying the progress of the case and the execution of the Plan of Arrangement. The Plan is doubtless not perfect but, in the absence of a demonstration to the contrary, it constitutes a fair and equitable compromise regarding the claims of all the creditors. Since a large majority of the creditors approved the Plan, it is not up to a court of appeal to interfere without a valid reason and jeopardize the recovery of the debtor.

[302] It is thus not within the Board's jurisdiction to question the inclusion of employee claims in the plan of arrangement or indeed the makeup of the plan of arrangement itself or the mechanism that led to its acceptance by the creditors and approval by the Superior Court. Those matters were already argued before and decided by the appropriate judicial authorities. Under the circumstances, the Board cannot accept CUPE's argument that the employer's actions in regard to the plan of arrangement with creditors was a violation of the provisions of the *Code*.

d–Undermining of the representative character of the unions through its attempt to enter into specific agreements with employees in the regions with a view to having them waive the contracting-out clauses in the collective agreement

[303] According to the unions, following the failure of bargaining and the unions' refusal to drop the contracting-out clauses, the employer attempted to negotiate specific agreements directly with some employees without the consent of the unions, seeking at the same time to obtain what it had failed to get in the period of intense bargaining.

[304] The employer, for its part, argues that any actions taken by Mr. Michel Cloutier cannot be connected to the employer, since Mr. Cloutier was acting on his own, without the employer's consent.

[305] According to the evidence, Mr. Cloutier, then vice-president in charge of regional stations, had been responsible for the stations in Estrie, Mauricie, Québec and Saguenay since around April 2008, and reported directly to the president of TQS until August 2008 and then to Mr. Tony Porrello.

[306] The evidence shows that Mr. Cloutier met with some employees working at the Estrie and Mauricie stations to discuss the possibility of dropping the contracting-out clause in their collective agreement in return for their obtaining their severance benefits through double billing as freelancers, through a mechanism that need not be re-explained here.

[307] In regard to the station in Saguenay, according to the uncontradicted oral evidence of Patrick St-Pierre and Jean-Marie Munger, the manager of the station himself called members of the production department team to a meeting on or around May 13, 2008, and proposed that they drop the contracting-out clause in the collective agreement in return for freelance work for which they could double bill. The offer was not made to all employees covered by the collective agreement in question, but only to the seven members of the production department team. In his testimony, Mr. Patrick St-Pierre explained that he had pointed out at the time that the seven employees alone could not decide the fate of the collective agreement provisions respecting contracting out and that all the members had voted against waiving such provisions in the previous weeks.

[308] When those talks were held in the Mauricie and Saguenay regions, the union as such was not invited to take part. The fact that some of the employees involved in the talks were members of the executive of their respective unions does not change the fact that the union was not invited in its capacity as the representative of the employees and a party to the collective agreement respecting which amendments were being sought.

[309] The employees in Estrie as well as in Saguenay and Mauricie all refused to waive the contracting-out clause in their collective agreements and the right to file grievances in that respect in return for certain benefits. Only one person chose to accept the offer: Mr. St-Arnaud, the producer at the Trois-Rivières station and president of the Syndicat des réalisateurs de TQS Mauricie. In fact, in August 2008, Mr. Cloutier entered into an agreement directly with Mr. St-Arnaud, whereby Mr. St-Arnaud was to receive a car through a swap arrangement as well as a bathroom renovation as compensation for his full severance benefits, in return for his waiving any grievance or other form of recourse. In his testimony, Mr. Cloutier indicated that he had signed the said agreement in his capacity as general manager, but for his own personal benefit.

[310] In his testimony of March 24, 2009, Mr. Cloutier emphasized that he had persuaded Mr. Porrello to "let him be" in relation to the agreement with Mr. St-Arnaud "because it wasn't costing the company anything; I was swapping airtime—unsold airtime. That's why I did it."

[311] Of note is that, in his testimony of March 24, 2009, Mr. Cloutier stated the following in regard to the arrangement with Mr. St-Arnaud:

> And so the arrangement I wanted to make with Mr. St-Arnaud was compensation; I admit that. And as for the contracting out, in those conversations, I also said.... at some point, I pushed and said, "Look, let's just drop it. We're not gonna talk about it any more. We're gonna deep six it, because there isn't going to be any more. There are two (2) of you."
>
> (translation)

[312] The Board cannot accept the employer's arguments that Mr. Cloutier was not acting on the employer's behalf. Mr. Cloutier had been working for TQS since 1991 and had always held key positions related to the regional stations. When he did something in his capacity as manager, regardless of what it was, he was in the eyes of the employees acting on behalf of the employer. Furthermore, Mr. Maxime Rémillard testified that Mr. Cloutier had extensive expertise related to the regions and the employer had trusted him. Moreover, in his testimony of November 1, 2010, Mr. Rémillard stated the following:

> Mr. Cloutier enjoyed a great deal of autonomy because he had extensive experience with regional operations, had worked in Trois-Rivières, Sherbrooke, Saguenay and Québec for many years and had expertise related to those regions, so we trusted him and he was given a great deal of autonomy with regard to his department and his operations.
>
> (translation)

[313] Although he was not involved in the intense bargaining in Montréal, Mr. Cloutier also admitted that he had learned from his superiors in the third week of April 2008 that the news and commercial production services were to be discontinued. He had also been informed that the employer had offered to pay severance benefits in full in return for a large number of concessions on the part of the unions.

[314] As the Board noted in *Bell Canada*, *supra*, section 36 of the *Code* establishes a union's status upon certification as the exclusive bargaining agent for all employees in a bargaining unit. This principle of exclusivity of bargaining rights is recognized and protected throughout federal, provincial, and territorial labour legislation and is considered a fundamental element of labour relations in all jurisdictions. The exclusive nature of a union's rights to bargain on behalf of the employees it represents precludes any direct negotiation between employees and their employer.

Once a union is certified by the Board, "there is no room left for private negotiation between employer and employee" (see *Syndicat Catholique des Employés de Magasins de Québec Inc.* v. *Paquet Ltée*, [1959] S.C.R. 206).

[315] Additionally, in *Bell Canada*, *supra*, the Board noted that the role of the union as exclusive bargaining agent under the *Code* is not merely a corollary of the duty to bargain. The Board stated the following:

> [86] ... Nor does it evaporate once a collective agreement has been negotiated. In order to continue to give force to the freedom to become a member of a trade union and to reinforce the will of the majority of employees in the bargaining unit, the exclusive right must continue. The CLRB stated this principle clearly in *New Brunswick Broadcasting Co. Limited* (1988), 75 di 101 (CLRB no. 711):
>
> "... In the federal jurisdiction, certification orders have an ongoing function of defining and protecting the exclusive right of the bargaining agent to represent the affected employees for all purposes of collective bargaining. This exclusive right does not diminish after a collective agreement has been entered into or during the period when there is no collective agreement in effect. The collective bargaining regime which is created by the Board's certification process survives until the certification order is revoked by this Board. ...
>
> (page 107)"

[316] Thus, in light of the principle of exclusive representation rights of bargaining agents set out in section 36 of the *Code*, the failure of the employer and unions to find common ground shortly before the action taken by Mr. Cloutier and the manager of the Saguenay station, the "explosive" nature of the situation at the time, and the fact that the contracting-out clauses discussed directly with employees involved matters that had been negotiated and set out in the collective agreements in effect, the Board finds that the conduct of Mr. Michel Cloutier, Vice-President in charge of Regional Stations, TQS, and of the manager of the Saguenay station (notwithstanding the fact that Mr. Cloutier himself had asked him to take the action in question) were tantamount to interference by the employer in the representation rights of the unions.

[317] In *Bell Canada*, *supra*, the Board stated the following regarding bargaining conditions of employment directly with employees:

> [133] ... When an employer bargains terms and conditions of employment directly with employees, it bypasses the union altogether. The labour relations context, from which may be gauged the relative strength or vulnerability of the union's relationship with its members, becomes irrelevant. The moment an employer and a unionized employee agree on a matter that ought to have been negotiated with the

> union, the exclusivity of the union as bargaining agent and indeed the very purpose for which the union exists, is compromised. When an employer attempts to bargain directly with employees, it essentially makes an offer to render the union unnecessary.

[318] Consequently, the Board finds that the evidence clearly shows that, in attempting to enter into specific agreements with employees in the regions to have them waive contracting-out clauses or related rights, the employer interfered in the representation of employees by the unions concerned, in violation of section 94(1)(*a*) of the *Code*.

e–Use of regional production houses for commercial production and news production following the major lay-offs

[319] According to the unions, after failing in its direct negotiations with employees that would have had them waive the contracting-out clauses in return for the payment of severance benefits, TQS continued its efforts to place its commercial and news production operations outside union jurisdiction. In the unions' view, the whole purpose of those efforts was to decimate the bargaining units and side-step the provisions of the collective agreements.

i) Start-up of commercial production houses in the regions and in Québec

[320] According to the unions, at the same time that attempts were being made to negotiate directly with employees in the Mauricie, Estrie and Saguenay regions, commercial production houses were being launched. The unions allege that, without the help of TQS, those regional production houses would never have seen the light of day.

[321] In considering this issue, the Board paid special attention to the admissions filed by Projet momentum in Estrie, Point Bleu Productions in Mauricie and Zed Productions in Saguenay, and to the oral evidence of Messrs. Pierre Lauzer (Point Bleu Productions), Denis Gervais (Projet momentum) and Renaud Francoeur (Speed Média in Québec) relating to the start-up of their respective companies.

[322] On the one hand, it is true that the companies in question are owned by former unionized employees of TQS. On the other, there is nothing in the evidence that shows that the companies were

started up under the control of TQS. Rather, the evidence shows that all of those employees started up their companies shortly after being laid off not only because they wanted to create jobs for themselves after their sudden lay-offs, but also because, when they realized that TQS was discontinuing commercial production, they saw an opportunity to start up their own companies and assure themselves of a livelihood. TQS's clients were a natural market for those production houses and TQS cannot be faulted for referring its commercial production clients to those production houses given that it had in fact discontinued its own commercial production operations. It must be borne in mind that the announcement on April 23, 2008, of lay-offs to take effect on June 1, 2008, and in August 2008, was sudden, and the testimony of some of the employees concerned revealed that they had been going though some extremely difficult times. The fact that those former employees took advantage of the gap left by TQS does not mean that TQS was controlling or involved in the start-up of the companies. In the view of the Board, the evidence shows that all of the companies in question are autonomous and were started to seize the opportunity presented by TQS's decision to discontinue commercial production work for its clients. The Board further notes that TQS wields no control over the content of the commercial production work done by those companies.

[323] In regard to the equipment, Mr. Cloutier testified that he had tried to help former employees to procure TQS equipment at lower cost, but had quickly been told by Mr. Porrello not to get involved—that if the equipment was put up for sale, its value would first be determined by TQS's technical director. In any event, the Board does not believe that the production houses in the regions were started up because TQS might be able to help them purchase some of its equipment that was no longer being used. For example, Mr. Pierre Lauzer of Point Bleu Productions stated that his company had started its operations in June 2008, following a meeting with a regional sales manager for the CBC French network, who had been looking for someone to produce advertising for sale by the CBC. Mr. Francoeur of Speed Média, who was affected by the lay-off announcement of April 2008, stated that, after leaving TQS and realizing that TQS would no longer be doing any commercial production work, he had seen an opportunity to pick up TQS's clientele. As for Projet momentum, the evidence shows that Mr. Denis Gervais already had a small commercial production company, which he had started in 2007, well before the lay-offs of April 2008, and he had been planning to expand it for some time. Projet momentum moreover purchased equipment that was

more specialized than that owned by TQS, including an HD camera and a new editing room, which were financed through a financial institution.

[324] With the exception of Speed Média, the production houses never had any contracts with TQS in relation to the referral of clients. Furthermore, the evidence shows that there are no agreements providing that TQS's clients must deal exclusively with the production houses. Clients are not required to do business with those undertakings. They can use the services of any company they choose.

[325] Additionally, some of the production houses, including Speed Média, are involved in more than commercial production work; they are also active in the development of the corporate video sector and the Internet, and their operations are not limited to productions to be aired by TQS.

[326] The Board accordingly finds that the evidence adduced does not lead it to conclude that TQS was involved in the start-up of the production companies in the regions and in Québec. Those companies are not TQS creations and their start-up was not the result of interference by TQS in the unions' representation, with a view to decimating the bargaining units. The start-up of those companies flowed from TQS's business decision to in fact discontinue its commercial production operations and the resulting opening up of the market. The employer therefore did not violate the provisions of the *Code* in this regard.

ii) TQS news production

[327] According to the unions, TQS news production was illegally outsourced to ADN5. They submit that this was done by TQS in its continuing efforts to place its news production operations outside union jurisdiction.

[328] The Board deems that it is necessary here to distinguish between commercial production, which TQS stopped completely, and news production. It is the Board's understanding, as set out previously, that the regional production houses were started up as soon as TQS decided to in fact discontinue its commercial production operations.

[329] News production operations were a different story, however, since, in its decision of June 26, 2008, the CRTC required that TQS continue to broadcast a set number of hours of news. The evidence shows that Messrs. Richard Desmarais (former on-air host with TQS) and Sylvain Girard (former producer with TQS) decided to start up the ADN5 news agency in August 2008, after the CRTC had issued its decision. Mr. Desmarais stated that they had started producing news segments for TQS toward the end of September 2008. The company's operations at the time were limited to producing news for TQS.

[330] Several grievances were filed by the unions in the summer and fall of 2008 and in 2009, in which it was alleged that the employer was using contractors or independent production companies for news and commercial production work. In an arbitral award dated December 4, 2009, which was entered into evidence, Arbitrator Provençal allowed grievances alleging violation of the contracting-out provisions in the collective agreements of the CSN-affiliated unions in relation to news production by ADN5, but dismissed grievances relating to commercial production, self-promotion and infomercials. The following is an excerpt from the arbitral award:

> **ALLOWS** the grievances alleging violation of the contracting-out provisions set out in the collective agreements of the applicant unions in connection with the production of news by ADN5 and declares that the use of ADN5 contravenes the provisions prohibiting contracting out, **as it results in lay-offs.**
>
> (pages 112–113; translation; emphasis added)

[331] Mr. Richard Desmarais stated that ADN5 had taken over the production of news segments not only for Montréal, but also for Estrie, Mauricie, Saguenay and Québec. In Montréal, it deals with Les Productions 4C3 HD for the services of camera operators on site. In the regions, it deals with regional production houses Point Bleu Productions, Projet momentum, Zed Productions and Speed Média for access to technical services.

[332] The evidence also shows that it was Mr. Richard Desmarais, working through a numbered company of which he was an administrator, who acquired several pieces of TQS equipment after signing a contract with TQS on January 15, 2009. Mr. Desmarais moreover stated that he had purchased that equipment to enable his suppliers (the production houses with which he dealt) to

deliver the services he was seeking, that is, technical support, camera operator services, and studios for the production of regional news. The evidence indicates that it was during discussions with Mr. Louis Trépanier of TQS, or perhaps Mr. Michel Cloutier, that Mr. Desmarais had learned of the existence of regional production houses. He had then decided to do business with them.

[333] According to the employer, the award by Arbitrator Denis Provençal was revealing in that it showed TQS's clear right to cease production operations. Also according to the employer, it is not within the Board's jurisdiction to determine whether or not the purpose of the decision to discontinue production operations was actually to participate in or interfere with the formation or administration of a trade union or the representation of employees by a trade union.

[334] In his award, Arbitrator Provençal specifically found that TQS had not in fact discontinued news production, but had maintained control over it by contracting it out to ADN5. He went on to state the following:

> [330] It must be borne in mind that ADN5 has its head office on the premises of the new owners of TQS, that its management team is from TQS, its staff is from TQS, its subcontractors are from TQS, and its equipment is from TQS, and that its purpose is to produce news programming for TQS modelled after TQS productions. In short, these various facts show that ADN5 and its product, down to the smallest detail, are stamped with the TQS brand. Clearly, given the Quebec television landscape described by the witnesses for the employer, the product holds no market value for other broadcasters. Additionally, while the duration of TQS's exclusive right to broadcast the material appears to rule out any hope of resale to other Canadian or European French-language broadcasters after its expiry, it appears that the essentially local and regional nature of the content further limits any such possibility. In short, ADN5 produces news programming exclusively for TQS.
>
> [331] The only possible conclusion that can be drawn is that ADN5 is in fact under the control of TQS. **TQS has not in fact discontinued the production of news programming; it has merely contracted the operation out to ADN5.** I find that ADN5's sole operation is to produce news programming and sell it to TQS. It produces *TQS's news programming* and has been doing so since TQS discontinued in-house news production. The work normally performed by the employees covered by the contracting-out clause is now carried out by ADN5 employees and subcontractors: Point Bleu, Momentum TV, Zed Productions and Productions 4C3 HD.
>
> (translation; emphasis added)

[335] The Board is not bound by the findings set out above. Furthermore, the Board understands that its mandate is very different from that of the grievance arbitrator and that it is not its role to weigh the effect of TQS's decisions concerning the contracting-out clauses of the collective agreement. It also understands that the issue to be determined in the instant matter is whether,

through its actions, the employer interfered with the unions' representation of employees within the meaning of section 94(1) of the *Code*.

[336] However, the evidence presented to the Board and the testimonies of Messrs. Richard Desmarais and Sylvain Girard have shown that TQS was in *de facto* control of the news production by ADN5 and it was its relationship with that company that allowed it to comply with the CRTC's news broadcasting requirements. The Board realizes that, in its decision of June 26, 2008, the CRTC did not compel TQS to produce news programming itself; it merely required that it broadcast a set number of hours of news on its network. However, TQS did not actually relinquish *de facto* control over the production of the news that it broadcasts.

[337] There is no written contract between TQS and ADN5 with respect to the production of all of the news segments or other news programming broadcast by TQS. Nor was there any contract with Nexzo, which acted as a sort of intermediary for ADN5 and TQS for the final editing of the news produced for TQS into 2009. Mr. Desmarais stated in his testimony that TQS had financed the "original investment" for the ADN5 news agency, but did not mention any written undertaking in this regard. ADN5 used the same premises as TQS when it started up its operations and it had no contract respecting the use of TQS equipment at the time the complaint in the instant matter was filed (contract signed on January 15, 2009). Its sole purpose was to produce news programming for TQS.

[338] The standard employment contract for ADN5 employees entered into evidence contains a clause that conveys the connection between the two companies. It reads as follows:

> ... your employment is closely linked with the service contract recently awarded to our company for the provision of news programming for broadcast on TQS television network stations (the "Service Contract"). Consequently, should the Service Contract be terminated or cancelled for any reason whatsoever, you hereby recognize that your employment with our company will be terminated immediately on simple written notice.
>
> (translation)

[339] In testifying before the Board on October 9, 2009, Mr. Desmarais explained the context of discussions that were held between TQS, ADN5 and Nexzo regarding the production of news segments, clearly relating the key role played by TQS and its control over news production:

> And then when we started talking, in my mind I couldn't see it as anything but a three-party arrangement; the broadcaster is after all involved in that sort of thing, since it can criticize, can say what it wants, can ask me...can ask for changes. To my knowledge, what is broadcast, even if it goes through Nexzo—well, the broadcaster still controls what actually airs, no matter how many stakeholders there are.
>
> (translation)

[340] Mr. Desmarais also stated the following in his testimony with regard to meeting the licensing conditions that the CRTC had imposed on TQS:

> It was my responsibility to add up the minutes of programming to ensure that the broadcaster was not placed in a position of having contravened its licensing conditions...
>
> ...
>
> Listen, things started out one way and then they even changed along the way. It was a question of "if we did more here and less there, we'd end up with the same result and it might improve what is offered to the viewing audience."
>
> (translation)

[341] Given this context, the Board finds that TQS set up a mechanism that allowed it to control the production of the news it broadcast but to do so outside the existing bargaining units and any kind of union representation. It should be recalled that, after TQS decided to discontinue all in-house production, including news production, 224 out of a total of 313 unionized permanent employees were laid off, as announced on April 23, 2008. Once the CRTC's decision of June 26, 2008, respecting the requirement to broadcast news was known, arrangements could have been made with the unions to allow some laid-off employees to be recalled and to be involved at least in part in the production of news for broadcast by TQS starting in the fall of 2008. As for the technological development issues, the parties could have talked and arrived at some compromises.

[342] In its written submissions, the employer contended that TQS had been "forced to rethink its positions" (translation) during the hearings relating to news broadcasting held by the CRTC in June 2008. Beyond the considerations regarding TQS's technical equipment, the journalism

expertise and know-how concentrated in the bargaining units should have merited at least some consideration under the circumstances. However, they were dismissed without any discussion with the unions. This in fact was confirmed by Mr. Éric Lévesque during his cross-examination on January 19, 2011, respecting the Québec station, where 42 of 46 unionized employees had been laid off. The Board thus concurs with the CSN-affiliated unions that TQS acted "as though there no longer were any bargaining agents" (translation).

[343] The Board wishes to draw attention here to the similarity between the facts in the instant matter and those in *D.H.L. International Express Limited*, *supra*. In that matter considered by the Board, the employer had contracted out work previously performed by employees in the bargaining unit. In fact, the bargaining unit, which had originally comprised some 18 employees, had been cut down to a mere three employees and stripped of the work that was now performed by some 23 outside contract or agency personnel. As in the instant matter, the company's actions had led to the decimation of the bargaining unit. Its actions had also severely undermined the union's ability to negotiate a collective agreement on behalf of the employees it represented. In that matter, the Board found that there had been interference by the employer in the representation of employees by the union, in violation of section 94(1) of the *Code*. The Board stated the following:

> [107] Regardless of the intentions of DHL, the result of its prohibited conduct has been to undermine the union's ability to represent its members in collective bargaining and to threaten the viability of the bargaining unit itself. The impact has been profound, not minimal or incidental. The Teamsters' representational standing was reduced from a majority to slightly more than 10% of the people performing bargaining unit work, from the time that the application for certification was filed to the time of the hearing in these proceedings as a direct result of the company's actions. The company's actions have interfered with the "representation of employees" by the Teamsters and rendered meaningless the employees' fundamental freedom and right to engage in collective bargaining. By systematically stripping the bargaining unit of its numeric strength through improper means, DHL has gained a tactical advantage in negotiations.

[344] In the instant matter, the evidence has shown that TQS's current operations are a significant departure from the practice prior to April 23, 2008, when operations were carried out by unionized employees. It is true, as maintained by the employer, that a company has the right to discontinue production operations. In its decision in *I.A.T.S.E., Stage Local 56* v. *Société de la Place des Arts de Montréal*, 2004 SCC 2; [2004] 1 S.C.R. 43, the Supreme Court of Canada adopted the words of Lesage J. in *City Buick Pontiac (Montréal)* Inc. v. *Roy*:

> [28] ... The leading case is *City Buick Pontiac (Montréal)* Inc. v. *Roy*, [1981] T.T. 22, at p. 26, in which Judge Lesage made the following observations:
>
> "[TRANSLATION] In our free enterprise system, there is no legislation to oblige an employer to remain in business and to regulate his subjective reasons in this respect... If an employer, for whatever reason, decides as a result to actually close up shop, the dismissals which follow are the result of ceasing operations, which is a valid economic reason not to hire personnel, even if the cessation is based on socially reprehensible considerations. What is prohibited is to dismiss employees engaged in union activities, not to definitevely close a business because one does not want to deal with a union or because a union cannot be broken, even if the secondary effect of this is employee dismissal. ..."

[345] The Court went on to add the following:

> [29] The Union acknowledges the general right of enterprises to go out of business, but argues that the SPA did not in fact do so during the Disputed Period, or did not do so in a *bona fide* manner. As the Union rightly notes, courts and tribunals must carefully scrutinize the facts of each case to make sure that the decision to close up shop is genuine and not merely a strike-breaking ruse. I again adopt the words of Judge Lesage in *City Buick Pontiac*, *supra*, at p. 26:
>
> "[TRANSLATION] It is still necessary, and this is of utmost importance, that the decision to discontinue be authentic and not a simulation, merely an argument in the arsenal of methods used to overcome union demands, because it would then be a pretext and a fiction that would preclude a consideration of it independently of the reasons therefor. This would be the case if, by subterfuge, the employer continued its activities indirectly, with the assistance of others, elsewhere or in other ways or after a period of time has passed in order to keep up appearances. Any indication that it is keeping a door open to resume the same business would preclude a finding of its complete and definitive discontinuance..."

[346] In the instant matter, following the decision of the CRTC on June 26, 2008, TQS decided to contract out the production of news programming to ADN5, while maintaining total control over such production, without trying to negotiate necessary adjustments with the unions and allowing them to consider the status of the unionized employees who had previously produced the said news.

[347] In light of the evidence and the case law, the Board finds that the actions of TQS accordingly undermined union representation, even jeopardizing the viability of the bargaining units, contrary to the provisions of section 94(1) of the *Code*.

[348] Although, as previously stated, anti-union animus is not a necessary ingredient for a determination of a violation of section 94(1)(*a*) of the *Code*, the Board also finds that, from the time the CRTC required it to continue to broadcast news programming, TQS should have sought to involve the unions. The evidence shows that the unions were completely ignored, and the Board finds that the employer's actions were therefore motivated, at least in part, by anti-union animus,

since the work that was contracted out would normally have been performed by members of the bargaining units.

[349] The employer therefore violated section 94(1) of the *Code* in this respect.

f–Consolidation of positions

[350] In the Board's view, the evidence regarding the consolidation of the positions of editor and producer, which were covered by two separate bargaining units, shows that discussions were held with representatives of the CSN unions concerned, even though in the first case they were held after a post-production editor advised Ms. Cynthia Ouellet, Secretary of the executive of the Syndicat des employé-e-s de l'ingénierie de TQS Inc.(FNC-CSN), that the employer had offered him a position as producer-editor. Furthermore, according to the oral evidence of Ms. Ouellet, the plan to consolidate the positions had gone nowhere in the end.

[351] With regard to the producer-editor position offered to Mr. Patrick Handfield in November 2008, everything also points to discussions finally being held with the unions concerned, since an agreement was reached with them in April 2009.

[352] The Board's interim order issued on December 23, 2008, in *TQS Inc. (CKSH-TV and CKFS-TV)*, 2008 NBU 558, prevented any undermining of the representative character of the unions in relation to the consolidation of positions until an agreement could be entered into with the unions in April 2009.

[353] The CSN unions also submitted that, in October 2008, the employer had offered two producers more generous voluntary severance packages than those provided for under the collective agreement without the written consent of the Syndicat des réalisatrices et réalisateurs en auto-publicité de TQS Inc. (FNC-CSN). The evidence shows that one of those two employees chose to stay with TQS and that the other had been president of the Syndicat des réalisatrices et réalisateurs en auto-publicité de TQS Inc. (FNC-CSN). The latter moreover signed an agreement on October 28, 2008, which was also signed by the other representative of that union.

[354] With regard to the reorganization of promotional material routing work in the regions, the position of sales assistant was eliminated. As for the position of in-house representative that was created, the employer explained that it was a non-unionized position.

[355] The Board accordingly does not have before it sufficient evidence to find that the employer interfered with the representation of the unions and violated the provisions of the *Code* for this aspect of the complaint.

VIII–Findings

A–Complaint Pursuant to Section 94(1) of the *Code*

[356] For the foregoing reasons, after considering the evidence and case law and weighing the parties' arguments, the Board allows the unions' complaint in part and finds as follows:

(a) The employer **did not violate** the provisions of the *Code* through its lay-off announcement of April 23, 2008, and during bargaining that took place in April and May 2008;

(b) The employer **violated** section 94(1) of the *Code* when it issued press releases on April 25, 2008, and May 1, 2008, which undermined the representative character of the unions;

(c) The employer **did not violate** the provisions of the *Code* in relation to the matters connected with the plan of arrangement with creditors;

(d) The employer **violated** section 94(1) of the *Code* by interfering in the unions' representation of employees when it attempted to negotiate specific agreements directly with some employees belonging to the bargaining units with a view to having them waive the collective agreement's contracting-out clauses;

(c.1) The employer **did not violate** the provisions of the *Code* when it availed itself of the services of the production houses for commercial production purposes;

(c.2) The employer **violated** section 94(1) of the *Code* when, following the CRTC's decision of June 26, 2008, respecting the renewal of TQS's licences, it had its own news programming produced outside the bargaining units;

(f) The employer **did not violate** the provisions of the *Code* in relation to the consolidation of positions.

B–Complaint Pursuant to Section 94(3) of the *Code*

[357] Although the unions briefly referred to section 94(3) of the *Code* in their complaint, the Board is unable to find any violation of this provision of the *Code* by the employer on the basis of the evidence adduced and arguments made by the parties.

IX–Remedies

[358] The applicant unions have asked that the Board retain jurisdiction in this matter to order appropriate remedies. Consequently, the Board gives the parties 45 days from the date of the instant decision to arrive at an agreement respecting remedies. The Board reserves the right to decide any issues relating to remedies in the event that the parties fail to reach an agreement.

Translation

Louise Fecteau
Vice-Chairperson

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